IN THE

Supreme Court of the United States

No. 87.

OCTOBER TERM, 1942.

THE PUBLIC UTILITIES COMMISSION OF OHIO, GEORGE McCONNAUGHEY, CHAIRMAN, DENNIS F. DUNLAVY AND HARRY M. MILLER, MEMBERS OF THE PUBLIC UTILITIES COMMISSION OF OHIO, THOMAS J. HERBERT, ATTORNEY GENERAL OF OHIO, AND KENNETH L. SATER, SPECIAL COUNSEL FOR THE PUBLIC UTILITIES COMMISSION OF OHIO,

Appellants,

vs.

THE UNITED FUEL GAS COMPANY, THE PORTSMOUTH GAS COMPANY AND THE CITY OF PORTSMOUTH, OHIO,

Appellees.

BRIEF OF APPELLANTS.

THOMAS J. HERBERT,
Attorney General of Ohio,
KENNETH L. SATER,
Special Counsel for The Public Utilities Commission of Ohio,
Counsel for Appellants.

RODENFELS LAW PRINTING COMPANY, Columbus, Ohio

INDEX.

Cases Cited.

Annual Reports.

Statutes.

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BRIEF OF APPELLANTS.

In the course of a gas rate case then pending before it, and for the purpose of enabling it to determine a just

and reasonable distribution rate therein, The Public Utilities Commission of Ohio, on April 18, 1935 and May 29, 1935 issued two orders directly involving appellee, United Fuel Gas Company, which company had theretofore not been an active party in such proceedings. These orders appear respectively as Appendix 1 and Appendix 2 attached to the end of this brief. These proceedings in which the said two orders were issued, were held pursuant to Sections 614-44 to 614-46, both inclusive of the Ohio General Code; these and the other relevant statutes appear in Appendix 3 to this brief.

Claiming that the orders in question interfere with interstate commerce, impair the obligation of its contract, deprive it of due process of law, and, later, conflict with the provisons of the Federal Natural Gas Act (June 21, 1938, c. 556, 52 Stat. 821 et seq.; U. S. C. A. Tit. 15, ch. 15B, sec. 717 et seq.), appellee United Fuel Gas Company, sought and obtained interlocutory and permanent injunctive relief against the enforcement of such orders from a statutory three-judge court sitting in the United States District Court for the Southern District of Ohio, Eastern Division. The opinion and order of that court are not yet reported but appear as Appendix 4 and Appendix 5, respectively, to this brief.

This appeal from that opinion and order is based on Section 238 of the Judicial Code (March 3, 1911, c. 231, sec. 238, 36 Stat. 1156 as amended; U. S. C. A. Tit. 28, sec. 345) and Section 266 of the Judicial Code (June 18, 1910, c. 309, sec. 17, 36 Stat., 557 as amended; U. S. C. A., Tit. 28, sec. 380). A statement as to jurisdiction has been duly filed herein and probable jurisdiction was noted by the Court on June 1, 1942.

STATEMENT OF FACTS.

For some time prior to 1932 and at all times since then, The Portsmouth Gas Company, a corporation organized and existing under the laws of the state of Ohio with its office and principal place of business in the city of Portsmouth, Ohio, has been selling and distributing natural gas to consumers in that city. That company and that city are both parties appellee herein. The Portsmouth Gas Company is not a producer of gas and has no available gas supply of its own. The gas which it has been so selling and distributing is purchased by it from appellee, United Fuel Gas Company (hereinafter referred to as United Fuel), a corporation organized and existing under the laws of the state of West Virginia of which state it is a citizen and resident.

United Fuel produces and purchases in West Virginia and Kentucky the gas which it has been selling both to the Portsmouth Gas Company and to the other customers and consumers hereinafter mentioned and described. The gas so purchased and produced by United Fuel is conveyed by it in a continuous flow, through a pipe line owned by it, from the points of its production in West Virginia and Kentucky to a point in the state of Ohio where it is delivered to the Portsmouth Gas Company. A substantial part of that gas so purchased and produced and flowing through the same line is utilized by United Fuel for retail sales by it to domestic customers and consumers in the town of New Boston, Ohio, and in the city of Ironton, Ohio, in which communities United Fuel also owns and operates the distribution systems

there in use. Both New Boston and Ironton are closer than the city of Portsmouth and the Portsmouth Gas Company to the induction end of United Fuel's said pipe line. Insofar as the record shows, there is no inter-corporate affiliation as that phrase is ordinarily used between United Fuel and the Portsmouth Gas Company either by way of interlocking directorates or otherwise, and it has been herein so found.

Effective as of November 1, 1931, United Fuel and the Portsmouth Gas Company entered into a five-year contract for the sale and delivery of natural gas by United Fuel to the Portsmouth Gas Company at the price of 37 cents for each one thousand cubic feet (M c. f.). The contract also provided: (1) that the obligation of United Fuel to deliver gas thereunder should be subordinate to all previous obligations assumed by it to furnish natural gas to others, including the Ohio Fuel Supply Company (now merged with the Ohio Fuel Gas Company), the city of Cincinnati, the Central Kentucky Natural Gas Company, the Louisville Gas and Electric Company, the Hope Natural Gas Company, the Pittsburgh and West Virginia Gas Company and the Warfield Natural Gas Company; and (2), that the Portsmouth Gas Company agreed not to hold United Fuel liable for any failure in the supply of gas under the contract if United Fuel shall have used due diligence to prevent such failure. Since the date of its original expiration this contract has been renewed at various times and its schedule of rates has now been filed by United Fuel with the Federal Power Commission since the passage of the federal Natural Gas Act. The entire contract is set forth on pages 12-16 of the record herein.

On February 24, 1932, the council of the city of Portsmouth passed an ordinance prescribing for the balance of the period of the franchise to the Portsmouth Gas Company (two years) the maximum rates for furnishing natural gas to the consumers, and in the public grounds and buildings of the city of Portsmouth. The rate so established was 45 cents per M c. f. whereas the rate theretofore in effect had averaged about 65 cents per M c. f. Pursuant to Sections 614-44 et seq., Ohio General Code, the Portsmouth Gas Company made complaint and appealed from such ordinance to appellant, The Public Utilities Commission of Ohio (hereinafter referred to as the commission), and, during the pendency of its complaint and appeal, elected to charge under bond duly filed the schedule of rates in effect immediately prior to the effective date of the ordinance which said rates it has now collected for more than ten years even though the ordinance in question expired eight years ago last February. As the hearings progressed, the commission's order of June 18, 1934 made United Fuel a party to the proceeding before the commission and directed it to file with the commission a copy of its contract with the Portsmouth Gas Company whereunder it was then, as above stated, selling natural gas to the Portsmouth Gas Company for distribution in the city of Portsmouth; no appeal was taken from that order.

The commission's finding and order appearing at Appendix 1 attached hereto shows that on April 18, 1935, the commission found the rates and charges fixed by the ordinance in question to be manifestly unjust, unreasonable and insufficient to yield a reasonable compensation to the Portsmouth Gas Company, that such rates and charges should not be ratified or confirmed and that pur-

suant to Section 614-46, Ohio General Code, the commission should substitute reasonable and just rates and charges therefor. At the same time the commission found that the furnishing of natural gas by United Fuel to the Portsmouth Gas Company, as described above, was a public utility service within the meaning of Section 614-2, Ohio General Code, and that the rates charged therefor were subject to the jurisdiction of the commission. The commission further found that it was unable to determine the just and reasonable rates and charges to be substituted for those fixed by the ordinance unless it had proof from United Fuel of a just and reasonable rate to be charged by it for the furnishing of natural gas to the Portsmouth Gas Company. The commission consequently ordered United Fuel to prepare and present all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by United Fuel to the Portsmouth Gas Company for natural gas so furnished for distribution within the city of Portsmouth.

On application of United Fuel and by stipulation of the parties to the proceeding before the commission, there was made the commission order of May 29, 1935 which appears as Appendix 2 attached hereto; this order enlarged somewhat on the findings contained in the commission's previous order of April 18, 1935, described and referred to just above, but left untouched the earlier instructions to United Fuel relative to the production of testimony and exhibits.

On July 3, 1935, United Fuel filed its bill of complaint in the United States District Court for the Southern District of Ohio, Eastern Division, praying that interlocutory and permanent restraining orders issue enjoining appellants herein both from enforcing the two above

described orders of the commission dated April 18, 1935 and May 29, 1935 and from regulating or attempting to regulate the transactions between United Fuel and Portsmouth Gas Company under the contract also described above. Some relief was sought against the city of Portsmouth but none against the Portsmouth Gas Company. Answers were filed by all parties in the lower court and a stipulation entered into to the effect that the findings of fact in the commission's order of May 29, 1935 might be treated as admissions by the parties thereto with regard to the natural gas and its movement pertinent to the consideration of the question involved; it was also stipulated that it would cost United Fuel more than $3,000.00 to comply with the commission's two said orders. Thereafter, the record shows, three amended and supplemental bills of complaint were filed by United Fuel and two supplemental answers by these appellants.

So made up, the case was decided by a statutory three-judge court (Allen, P. J., Nevin and Underwood, J. J.), which handed down its opinion on October 2, 1941, and on January 16, 1942, granted an order and decree temporarily and permanently enjoining and restraining appellants herein from enforcing and executing the two said orders of the commission. From that order and decree this appeal was duly taken.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

On this appeal appellants will urge all of their assigned errors.

SUMMARY OF ARGUMENT.

Appellants' argument that it has at all times had jurisdiction to issue and execute its two orders of April 18, 1935, and May 29, 1935, is based on the four points with their subdivisions as follows:

I. The transactions between United Fuel and the Portsmouth Gas Company do not constitute interstate commerce either factually or legally.

A. The absence of interstate commerce from the factual point of view is illustrated by three matters.

(1) The movement of gas in United Fuel's line.

(2) United Fuel's pleadings before the appellant commission.

(3) The effect of United Fuel's contract with the Portsmouth Gas Company.

B. Interstate commerce from the legal point of view does not exist.

(1) The decisions of this court considered as to their facts.

(2) The decisions of this court considered in their chronological order.

(3) The law of interstate commerce generally.

II. At no time in the proceedings before the commission was United Fuel denied due process of law.

III. The two said orders of the commission have not impaired either the contract between United Fuel and the Portsmouth Gas Company or any continuation thereof to date.

IV. The Federal Natural Gas Act has no bearing at all on the case at bar.

ARGUMENT.

I.

THE TRANSACTIONS BETWEEN UNITED FUEL AND THE PORTSMOUTH GAS COMPANY DO NOT CONSTITUTE INTERSTATE COMMERCE EITHER FACTUALLY OR LEGALLY.

(Assignments of Error, Nos. 1, 2, 3, 4, 9, 10, 11, 12, 13, 14.)

Particularly in the matter of its decision on the question of interstate commerce did the District Court disregard two principles recognized by this court. One of these principles is that there can not be recognized a vested right to do a manifest wrong. See Pearsall v. Great Northern Railway, 161 U. S., 646, 675; see also, Foster v. Essex Bank, 16 Mass., 245, 273, 8 Am. Dec., 135, 139. The other is this court's interpretation of the principle of arm's length bargaining. Let us consider how these two principles apply to the case at bar.

A. The Absence of Interstate Commerce from the Factual Point of View Is Illustrated by Three Matters.

(1) The Movement of the Gas in United Fuel's Line.

The Portsmouth Gas Company is a local distribution company located in and serving only the city of Portsmouth, Ohio. It is an Ohio corporation and the record does not show that it is qualified to do business or is doing business in any other locality or state. United Fuel is a West Virginia company and has its principal

place of business in that state. It produces, transmits, sells and distributes natural gas in West Virginia and transmits, sells and distributes natural gas both wholesale and retail in Ohio; its activities in other states are not disclosed but the contract attached to its bill of complaint indicates that its dealings with other companies take it up to, if not into, both Kentucky and Pennsylvania. Both commission and District Court found that these two companies are not affiliated by way of interlocking directorates, unity of stock interest, parent holding company or otherwise.

On the basis of the foregoing, the District Court held that when two such companies agree by contract for a supply of gas which is to be produced or purchased by one company in West Virginia and Kentucky and transmitted by it to a point in Ohio for delivery to the other party and which is to be paid for by the other party on the basis of a stipulated purchase price, that contract and that transaction based thereon constitute interstate commerce; and there being no intercorporate affiliation between those parties, as was the situation in United Fuel Gas Company v. Kentucky Railroad Commission, 278 U. S., 300, the Ohio commission has no power of regulation in the premises.

Any such conclusion, we submit, is under the circumstances of the case at bar a tacit recognition of a vested right to do a manifest wrong under the guise of interstate commerce and is also a complete misconception of the meaning and purpose of the principle of arm's length bargaining. In the first place it fails to recognize the District Court's own finding of fact that out of the same pipe line used by United Fuel to deliver gas to the Portsmouth Gas Company, United Fuel has also been dis-

tributing gas in New Boston and Ironton, Ohio. In the second place, it also fails to recognize that United Fuel's distribution system in New Boston is closer to United Fuel's West Virginia source of supply than is Portsmouth and that its Ironton distribution system is even closer than is New Boston. In the third place, neither commission nor District Court found that "continuous flow from said points of production in West Virginia and Kentucky to a point in Ohio" is the same thing or even approximately the same thing as the unreduced pressure flow which was discussed in East Ohio Gas Company v. Ohio Tax Commission, 283 U. S., 465. The implication of the findings by commission and District Court is exactly the opposite.

Of course, the flow of gas in the case at bar was continuous. As the Hope Natural Gas Company pumps gas clear across the state of Ohio to the distribution company in the East Ohio case, cited just above, so does United Fuel pump a smaller volume of gas a much shorter distance in the case at bar. But continuous flow is not the controlling point. The point is that United Fuel was retailing gas in Ironton and New Boston from the same line that it used to deliver gas to the Portsmouth Gas Company and that it must have been so retailing its gas before any of the volume in its line was delivered to the Portsmouth Gas Company. It is perfectly obvious from these facts not only that the pressure was reduced in United Fuel's line but also that the pressure was reduced before any gas was delivered by it to the Portsmouth Gas Company.

When a shipper-vendor starts on its way a volume of gas sufficient in size to serve three communities and then en route diverts from that total volume enough gas to

serve two of the three communities before the balance of its wares reaches the third community there is bound to be a reduction in pressure after the diversions are made just as distinctly, if not just as greatly, as there was in the East Ohio case. That is just as obvious as is the fact that the pressure in an attic water faucet goes down when faucets on the first and second floors are in use.

In both the East Ohio case and the case at bar the flow of West Virginia gas was continuous but it was reduction in pressure rather than continuity of flow which resulted in the decision in the former case. In the East Ohio case the court found that there was a given volume of gas definitely earmarked for one purchaser only, delivered at unreduced pressure with no intervening sales at all, either wholesale or retail, between the point of departure in West Virginia and the Cleveland city gate. There the pressure was reduced although the flow continued and there the interstate movement ended. But in the case at bar there can be no earmarking because there are many buyers both retail and wholesale and the retail buyers are reached by United Fuel before it makes delivery to the Portsmouth Gas Company. This results in reduced pressure before the Portsmouth gate is ever reached. Cleveland was the gate in the East Ohio case, Ironton in the case at bar; at each point the package was equally broken.

This difference between continuous flow and reduced pressure is amply borne out by United Fuel's application for rehearing of the commission's order of April 18, 1935 (Exhibit F to its original bill of complaint, Record, 35). Therein United Fuel asked for findings by the commission that its West Virginia and Kentucky product moved "by constant flow through pipe lines, from the

said states of West Virginia and Kentucky into the state of Ohio" where it is delivered to the Portsmouth Gas Company. Never a word was said about unreduced pressure flow although the East Ohio case was at that time five years off the press. United Fuel obviously must not have asked for a finding of unreduced pressure because it could not substantiate such a request; nor did either commission or District Court so find and this distinction, we submit, displays clearly that in the case at bar the interstate movement ended at Ironton, Ohio, and not much later at Portsmouth.

When a vendor of gas comes into a state and by distributing gas, regardless of the point of production thereof, clearly subjects itself to the jurisdiction of the regulatory body of that state, it may not regain the aegis of interstate commerce simply by projecting farther into that state some of the facilities which first brought it under that state's jurisdiction and thereby opening to itself more extensive fields of operation. Such a vendor is not an interstate carrier as was the Hope Natural Gas Company in the East Ohio case; it is more like a peddler offering its wares up to the limit of its capacity to whomsoever will buy and, as such, is fully and completely subject to the jurisdiction of the state regulatory body. That is the situation in which United Fuel finds itself in the case at bar; it is clearly subject to the jurisdiction of appellant commission.

(2) United Fuel's Pleadings Before the Appellant Commission.

In addition there is another factual matter which the District Court overlooked. It is United Fuel's admission, unexpressed but nonetheless implicit in its application

for a rehearing of the commission's order of April 18, 1935 referred to above, that it is amenable to the jurisdiction of the commission and that the two orders of April 18, 1935, and May 29, 1935, are properly within the jurisdiction of that commission. The sixth paragraph of that application reads as follows:

> "The undersigned petitioner controverts the right of The Public Utilities Commission of Ohio to prescribe the rate at which petitioner shall furnish gas to the Portsmouth Gas Company under the contract which it has with said company, for the reasons heretofore stated in its answer herein. It does not question the right of said commission to call upon this petitioner for such evidence and facts as may be in its possession which may show or tend to show what would be a reasonable rate to be charged for gas to the consumers in the city of Portsmouth, and it offers to furnish to the commission such facts and evidence as may be desired, or to permit any officers or agents of The Public Utilities Commission of Ohio to ascertain such facts and evidence as may be desired from its records and books for the purpose aforesaid, but denies and protests the right or power of said commission to fix the rates at which petitioner shall sell the gas which it transports into the state of Ohio and delivers to the Portsmouth Gas Company."

It is common knowledge that consumers' gas rates, like consumers' power and water rates, are composed of three elements of cost (production, transmission and distribution), two of which are represented in the case at bar by the contract rate between United Fuel and the Portsmouth Gas Company. The commission's two disputed orders disposed of the third element of cost and then found that the ultimate distribution rate could not be determined without the presentation of certain evidence by United Fuel relating to the other costs.

In its application United Fuel denies the power of appellant commission to consider or review any of the con-

tractual rates charged by it in supplying the Portsmouth Gas Company but then turns directly around and offers to produce any evidence that it may have showing or tending to show what would be a reasonable distribution rate for the city of Portsmouth, which distribution rate is composed at least one-half of United Fuel's charges to the Portsmouth Gas Company. That offer, appellant commission points out, is acceptable to the commission not only as a tender of evidence and records, but also as an admission of subjection to the jurisdiction of appellant commission. United Fuel's general denial is, we suggest, controlled by its express tender.

(3) The Effect of United Fuel's Contract With the Portsmouth Gas Company.

The last consideration of the factual phase of the allegations of interstate commerce could be discussed with propriety under the subsequent heading of impairment of contractual obligations, but since the District Court treated it chiefly under the heading of interstate commerce it will be correspondingly treated herein. It deals entirely with that elusive phrase "arm's length bargaining" which apparently had its origin in legislative investigation and has since received judicial recognition by this court in Western Distributing Company v. Kansas Public Service Commission, 285 U. S., 119, 127, by the District Court in the case at bar, and by possibly a few other decisions.

Twelve to fourteen years ago that phrase arose in the course of an investigation of dealings between affiliated companies and their parent organizations. It was used to describe a situation wherein no financial advantage could be traced or laid to dealings wherein parties were

so associated by interlocking directorates, stock control or other connection, that the effect of their dealings might not be to the best interest of the public, of some part thereof, or of their own shareholders. In its original conception this phrase was linked only with improper use of intercorporate connections, and is best illustrated by the assumption that when parties to a transaction are affiliated or subject to a common control there is an absence of arm's length bargaining between them. It originally had no connection with or reference to dealings between unaffiliated or unconnected parties even though one or both were engaged in a field of business activity lending itself to monopolistic control; and as a result, there has arisen in the case at bar a factual situation wherein the District Court's use of that phrase in its original sense has caused it to be turned back on itself to the detriment of those whom it was designed to protect, the ultimate consumers of a utility service.

There is every reason to subscribe to a doctrine of arm's length bargaining particularly if there is a general and open market and if there are the safeguards of bargaining and competition to protect that market and that dealing. The theory is excellent but the theory alone is not sufficient because a purchaser's power to bargain and a purchaser's power to enter the open market presuppose the existence of such a market and a choice among sellers. It is therein that the District Court completely overlooked the various tests of arm's length bargaining in an open market laid down in Natural Gas Pipe Line Company v. Slattery, 302 U. S., 300, 308.

The District Court, as seen from its unreported decision herein, based its judgment and decree entirely on the fact that United Fuel and the Portsmouth Gas Com-

pany, as found by the commission, were unaffiliated parties; hence, arm's length bargaining existed between them. This ignores and nullifies this court's statement in the Slattery case that: "The price itself may be found to be so exorbitant as to persuade that the bargaining was not at arm's length," which is the only sentence in that entire opinion justifying the use of the Slattery case as a guide to the deciding of the case at bar. It also ignores the result of all of the other facts of the case at bar.

Let us assume with the District Court that there was an arm's length contract between United Fuel and the Portsmouth Gas Company since they were not corporate affiliates and see to what absurd conclusions it leads us, bearing always in mind that the contract relates to a two-year ordinance period beginning in February 1932, within which period the question is not one of conflict between state and federal regulation but one of either state regulation or no regulation at all. Let it also be borne in mind that United Fuel retails and wholesales from the same line. This contract appears as Exhibit A to United Fuel's original bill of complaint (Record, 12). Three points arise in connection with it.

(1) In the Western Distributing Company case, supra (285 U. S., 119), this court had under consideration a distribution rate for the city of Eldorado, Kansas. The carrier and distributor were affiliates. In discussing the duty of the carrier to furnish evidence of operating costs to the state commission as an aid in the determination of a reasonable distribution rate, this court held that that state commission was entitled to such information "although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition."

In the case at bar the District Court stated in the second paragraph of its opinion that "the Portsmouth Gas Company is not a producer of natural gas and has no available gas of its own." We point out not only that no general and open market under such circumstances is or ever has been available to the Portsmouth Gas Company but also that no usual safeguards of bargaining and competition are or ever have been open to it. This is not only true because of the inherently monopolistic nature of a business in a natural resource, but also because the Natural Gas Act now tends to emphasize that monopoly by its requirement of a certificate of convenience and necessity prior to the extension of a pipe line or other gas facility. But regardless of the Natural Gas Act, no company, we submit, will extend or seek to extend its lines so that it could sell to a distributor in a city no larger than Portsmouth, Ohio, with United Fuel already in the field. The qualification which this court laid down in the Western Distributing Company case was never fulfilled in the case at bar.

(2) Let us consider this arm's length contract in more detail. It calls for a charge of 37 cents per M c. f. for gas transmitted "to a point in the state of Ohio where it is delivered to the Portsmouth Gas Company." While that contract and its various renewals were going on, United Fuel was also selling gas at the Ohio River to the Ohio Fuel Supply Company, which later became a part of the Ohio Fuel Gas Company, an affiliate. The Ohio Fuel Supply Company and later the Ohio Fuel Gas Company transmitted the gas received from United Fuel at the Ohio River to the city of Columbus, Ohio, where it was sold to and distributed by the Federal Gas Company and the Columbus Gas and Fuel Company, now consolidated

with the Ohio Fuel Gas Company. See: Re Columbus Gas and Fuel Company, P. U. R. 1933A, 337, 342-343, and Columbus Gas and Fuel Company v. City of Columbus, 32 P. U. R. (N. S.), 321, 330.

Rate litigation arose in the city of Columbus concerning the ordinance periods 1929 to 1934 and 1934 to 1939. In both of these cases the question arose as to the amount to be considered a proper allowance for the distribution company in the city of Columbus to pay United Fuel either directly or through a carrier company for natural gas delivered by United Fuel at the Ohio River. This is, we point out, exactly what the Portsmouth Gas Company is doing in the case at bar except the companies herein are said to be dealing "at arm's length" while those in the Columbus cases were not.

The river rate in the former Columbus case was set at 22.04 cents per M c. f. See 1932 Annual Reports of the Public Utilities Commission, 54, also reported in P. U. R. 1933A, 337, 367, supra, and on appeal of the same case, Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, 127 O. S., 109, 116, 187 N. E., 7; Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, 292 U. S., 398, 408. In the second Columbus case the rate was set at 22.03 cents per M c. f. See 1939 Annual Reports Public Utilities Commission of Ohio, 20, 173, 32 P. U. R. n. s., 321, 369, 384, supra. The distribution rate in this latter case was twice appealed to the Supreme Court of Ohio but in neither instance was the river rate changed. Ohio Fuel Gas Company v. Public Utilities Commission of Ohio, 138 O. S., 483, 35 N. E. (2nd), 829, and Ohio Fuel Gas Company v. Public Utilities Commission of Ohio, 139 O. S., 581, 41 N. E. (2nd), 389.

We respectfully submit that if a vendor may deal with a stranger for 37 cents per M c. f. and at the same time deal with an affiliate at an average of 22.035 cents, the doctrine of arm's length bargaining needs overhauling. If not rectified, the decision of the District Court in the case at bar results in the recognition of a vested right to do a manifest wrong.

(3) But now let us consider once again this arm's length contract calling for 37 cents per M c. f. and let us consider what the Portsmouth Gas Company obtained for that price. It received a contract the second and sixth articles of which read as follows:

> "Second: It is agreed, however, that the obligation of the United Fuel Company at any time to furnish and deliver gas under this contract shall be subordinate to all previous obligations assumed by it to furnish natural gas to others, including the following:
>
> (a) Supplying consumers connected at any time directly to its distributing systems in West Virginia and Ohio;
>
> (b) The performance of a contract for the sale of gas to the Ohio Fuel Supply Company, under which it is now delivering gas to said company;
>
> (c) The performance of a contract for the sale of gas for use in the city of Cincinnati and in the Cincinnati district, under which contract it is now delivering gas for that purpose;
>
> (d) The performance of a contract for the sale of gas to the Central Kentucky Natural Gas Company, dated November 1, 1912;
>
> (e) The performance of a contract for the delivery of gas to the Louisville Gas & Electric Company dated July 5, 1913, as modified;
>
> (f) The performance of a contract for the sale of gas to the Hope Natural Gas Company, dated August 25, 1916, as modified;

(g) The performance of a contract for the delivery of gas to the Pittsburgh & West Virginia Gas Company at Cedarville, in exchange for gas delivered by said company to the United Fuel Company.

(h) The performance of a contract for the sale of gas to the Warfield Natural Gas Company, dated the twenty-eighth day of June, 1923."

"Sixth: The said Portsmouth Company agrees that it will not hold the United Fuel Company liable for any failure in the supply of gas under this contract, provided the said United Fuel Company has used due diligence to prevent such failure."

We do not know from the record what price United Fuel was obtaining from any of its seven or more prior obligees but we do know that Ohio Fuel Supply Company and its successors were paying 22.035 cents per M c. f. for the same product which United Fuel was selling to the Portsmouth Gas Company for 37 cents per M c. f. We do know, however, that a purchaser is presumed to get what he pays for if that purchaser is dealing (so found) at arm's length in what is said to be a general and open market subject to the usual safeguards of bargaining and competition. In the ordinary course of business dealings it is anomalous that a preferred obligee should pay materially less than the one who brings up the tail end of the procession; it is more logical to assume that the higher the price the greater the priority to the supply.

Yet here is a purchaser said to be dealing at arm's length in an open market and admittedly paying 37 cents for the same product which one not dealing at arm's length was obtaining for fifty per cent less; and all that the former acquired for its added premium of fifty per cent in the case at bar was an agreement not to hold the

vendor liable for a failure in supply, if the vendor's prior obligations assumed at lower prices, in one instance at least, with a corporate affiliate consumed more of its product than was in "due diligence" to be expected. (For the affiliation of four of the purchasers named in United Fuel's said contract, see In the Matter of Columbia Gas & Electric Corporation, 8 S. E. C., 443, 450.) It is idle to say in such a situation that if the purchaser is dissatisfied with the price it is paying, it is free to go into the general and open market. There is no such market in the case at bar either in 1932, 1933, 1934 or even 1942. We deny the existence of both a general, open market and the usual safeguards of bargaining and competition in such a situation. If the domestic consumers of gas in Portsmouth are to be subordinated to cheaper priorities in the hands of some one or more affiliates with no power in appellant commission to make due inquiry, arm's length bargaining has become a mockery which none may remedy if this appeal is denied; yet the hurdle of these three illustrations was taken by the District Court in stride.

The constitutional safeguards around interstate commerce and the inauguration of the doctrine of arm's length bargaining were equally intended to furnish protection through the contracting parties to their ultimate consumer-beneficiaries. They were never intended and should never be twisted into furnishing a shield behind which one or both of two contracting parties might even seem to hide for themselves unexplained charges from the scrutiny of the only available guardian of public interest. It is obvious, however, in the case at bar that the District Court's rejection of (then) Mr. Justice

Stone's test of exorbitant price in the Slattery case, supra (302 U. S., 300), will cause the doctrine of arm's length bargaining, like a whip, to backlash as injuriously against the gas consumers of Portsmouth Ohio, as it acts beneficially in such usual cases as that of the gas consumers of New Boston, Ironton and Columbus, Ohio. For the first time since the origin of the phrase, arm's length bargaining, we are confronted with such a situation that only by the use of the price test may there be continued the assurance of the protection for which that phrase was created. The District Court erred materially when it failed to apply that test.

Now let us turn to the law, bearing constantly in mind that appellants make no concession that the transactions of United Fuel in Ohio constitute interstate commerce; the following discussion is made only because the issues were raised either by United Fuel's bills of complaint or by the District Court's opinion.

B. Interstate Commerce from the Legal Point of View Does Not Exist.

When the leading decisions of this court in cases involving the movement of gas from one state to another are examined, it is found that never before has this court been confronted with such a situation as we find in the case at bar wherein the interstate carrier has been selling gas both wholesale and retail from the same line at the same time and in contiguous communities. Moreover, when those cases are then taken in chronological sequence, it is seen that it was only in the earlier decisions that state regulation was held to the ineffectual minimum indicated by the decision of the District Court

herein. Let us consider the ten following cases each of which is followed by the date of its decision in this court:

Kansas Public Utilities Commission v. Landon, Receiver, 249 U. S., 236, 245 (March 17, 1919);
Pennsylvania Gas Company v. Public Service Commission, etc., 252 U. S., 23, 29-30 (March 1, 1920);
Commonwealth of Pennsylvania v. State of West Virginia, 262 U. S., 553, 596-597 (June 11, 1923);
State of Missouri ex rel. Barrett v. Kansas Natural Gas Company, 265 U. S., 298 (May 26, 1924);
People's Natural Gas Company v. Pennsylvania Public Service Commission, 270 U. S., 550 (April 12, 1926);
Rhode Island Public Utilities Commission v. Attleboro Steam and E. Co., 273 U. S., 83 (January 3, 1927);
United Fuel Gas Company v. Kentucky Railroad Commission, supra, 278 U. S., 300, 309 (January 2, 1929);
East Ohio Gas Company v. Ohio Tax Commission, supra, 283 U. S., 465 (May 18, 1931);
Western Distributing Company v. Kansas Public Service Commission, supra, 285 U. S., 119 (February 29, 1932);
Natural Gas Pipe Line Company v. Slattery, 302 U. S., 300, supra (December 6, 1937).

(1) The Decisions of This Court Considered as to Their Facts.

The three cases which seem to stand out most strongly against appellant commission are the Landon case, the Barrett case and the Attleboro case, but the first two of these decisions specifically pointed out that there was no intercorporate relationship between the interstate carrier and the local distribution companies, and the same situation is found in the Attleboro case. Moreover, in those three cases there was no distribution activity such as that engaged in by United Fuel in the case at bar. The

interstate carrier in those cases dealt only in wholesale volumes of its product; and of course, in such event, the transaction would be interstate commerce. Also in the Landon case this court spoke only of "unreasonable interference by the state" and thus left untouched the jurisdiction of a state regulatory body to impose regulations on interstate commerce that were reasonable. This distinction was quoted and approved in the Barrett case and again in the Attleboro case.

Local regulations of a reasonable character were approved in the Pennsylvania Gas Company case which is factually parallel to the case at bar in so far as United Fuel distributes its Kentucky and West Virginia gas in Ironton and New Boston, Ohio. The case between Pennsylvania and West Virginia dealt with a state statute potentially capable of halting the entire interstate movement of all gas originating in West Virginia, a clear obstruction of interstate commerce and consequently clearly distinguishable from the case at bar even though that case still recognized the propriety of reasonable regulation by a state commission. In the People's Natural Gas Company case, the matter of interstate carriage of gas was only incidental to the decision of this court since that company was producing in Pennsylvania enough gas to meet the requirements of the Pennsylvania municipality (Johnstown) involved in the rate problem but it is strongly in point in that it holds that when the package is broken the state may act even though there was no definite earmarking of the various gases.

The United Fuel case in Kentucky involved an interstate carrier which dealt only in wholesale volumes of gas in Kentucky but this case is the first recognition of the fact

that intercorporate connections and affiliations must receive consideration when a state commission is regulating transactions affecting interstate commerce; we suggest that that case would have been much easier to decide if United Fuel had therein been retailing and distributing from the same line.

Like the utility in the Attleboro case, the Hope Natural Gas Company in the East Ohio case had only one customer in Ohio, a distribution company which purchased in wholesale quantities; it distributed no gas for itself in Ohio as does United Fuel in the case at bar, but therein as in the case at bar state regulation is proper when the pressure has been reduced for retail consumers.

In both the Western Distributing Company case and the Slattery case, interstate carriers again did only a wholesale business, and as in the Landon, Barrett and Attleboro cases, these movements of gas were held to constitute interstate commerce but, as in the United Fuel case in Kentucky, corporate affiliation was permitted to cut across the rigid barriers theretofore prohibiting state regulation affecting interstate commerce. We point out that in none of the foregoing cases did the interstate carrier transport gas in large volume from one state and sell it first at retail and then at wholesale from the same pipe line at the same time and at adjoining points.

None of these ten cases conflict with the commission's position in the case at bar; most of them, making due allowance for different factual situations, support it.

Although its effect was somewhat modified by the East Ohio case, supra, we suggest that there is nothing in the Pennsylvania Gas Company case, supra, to distinguish its following language from the case at bar or the East

Ohio case. Speaking of and quoting from the Minnesota Rate Cases (Simpson v. Shepard, 230 U. S., 532), the court said:

"The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that there existed in the states a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation. After stating the limitations upon state authority, of this subject, we said (p. 402): 'But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the states should continue to supply the needed rules until Congress should decide to supersede them * * *. Our system of government is a practical adjustment by which the national authority, as conferred by the Constitution is maintained in its full scope, without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress

must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.'

"The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from Federal control. June 18, 1910, Chap. 309, Sec. 7, 36 Stat. at L. 539, 544, Comp. Stat. Sec. 993, 8563, 5 Fed. Stat. Anno. 2d. ed. p. 1108, 4 Fed. Stat. Anno. 2d ed. p. 337.

"The thing which the state commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York."

(2) The Decisions of This Court Considered in Their Chronological Order.

It is equally interesting to consider these same decisions from a purely chronological point of view. When the first seven of these cases were decided, no mandate other than one of a strictly hands-off attitude came down to state regulatory bodies endeavoring to adjust gas rates for local consumers. True, as noted above, this court quoted at length from the Minnesota Rate Cases (Simpson v. Shepard, 230 U. S., 352) in the Pennsylvania Gas Company case, supra, but ten years were to pass before that quotation was put to use again in the United Fuel case in Kentucky with its clear permission to state regulatory bodies to extend their official inquiries, if necessary in the interest of justice and public welfare, to

dealings between affiliated companies even though those dealings were in the strictest sense interstate commerce.

A clear-cut application of the principle of looking behind corporate entities, the United Fuel case in Kentucky may have been due to either the great growth of utility holding company systems in the few preceding years, or to the recognition by courts of the fact that without any judicial curb the former attitude of strict observance of freedom of interstate commerce was beginning to defeat its own purpose, or both. Appellants state that the discussion of this court in the United Fuel case in Kentucky is directly relevant to and controlling over the case at bar. This court said, on page 309:

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose of state supervision is to prevent such discriminations (see New York ex rel. New York & Q. Gas Co. v. McCall, supra, at p. 351, 62 L. ed. 342, P. U. R. 1918A, 792, 38 Sup. Ct. Rep., 122), and if a public service company may not refuse to serve a territory where the return is reasonable, or even in some circumstances where the return is inadequate, but that on its total related business is sufficient (Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, supra, at p. 25 (51 L. ed. 944, 27 Sup. Ct. Rep., 585, 11 Ann. Cas., 398); Missouri P. R. Co. v. Kansas, supra, at p. 277 (54 L. ed., 478, 30 Sup. Ct. Rep., 330)), it goes without saying that it may not use its privileged position, in conjunction with the demand which it has created, as a weapon to control rates by threatening to discontinue that part of its service if it does not receive the rate demanded. The powers of the state, so far as the Federal Constitution is concerned, were not exceeded by the action of the

(state) commission, in compelling appellants to continue their service in the cities named so long as they continued to do business in other parts of the state, and to there avail of the extraordinary privileges extended to public utilities."

This was the first long step forward in the matter of utility regulation.

If Kentucky in 1929 might compel continuation of wholesale service so also may Ohio in 1932 inquire into, and establish, if necessary, the just and reasonable charge for such service especially when the interstate character of that service is extremely questionable if it exists at all.

Fifteen months later this court sustained in the East Ohio case a state excise tax even though it was levied on the proceeds of the sale of gas that had moved in interstate commerce; and nine months later, in the Western Distributing Company case, there came the first pronouncement of this court in gas rate litigation that consideration must also be given to such matters as arm's length bargaining, general and open market and bargaining and competition. That was the second long step forward. To receive constitutional protection, interstate commerce had formerly to be found free of improper intercorporate dealings; now it must also be conducted in an open market and where there is full opportunity to bargain and compete. There is no question of conflict between state and federal power; there is only the matter of the need of regulation and of meeting that need with the only available tools—state commissions.

It was nearly six years later before there was need or desire to explain further the doctrine of arm's length

bargaining but it was done in the Slattery case wherein exactly the same information was sought by a state commission as is sought by appellant commission herein, and wherein exactly the same claims of constitutional protection were made as have been asserted by United Fuel in the case at bar. In denying injunctive relief in the Slattery case, this Court on pages 306-307 said:

> "We can find in the commerce clause and the Fourteenth Amendment no basis for saying that any person is immune from giving information appropriate to a legislative or judicial inquiry. A foreign corporation engaged exclusively in interstate commerce within the state is amenable to process there as are citizens and corporations engaged in local business. International Harvester Co. v. Kentucky, 234 U. S., 579, 58 L. ed., 1479, 34 S. Ct., 944. It is similarly subject to garnishment and writ of attachment. Davis v. Cleveland, C. C. & St. L. R. Co., 217 U. S., 157, 54 L. ed. 708, 30 S. Ct., 463, 27 L. R. A. (N. S.) 823, 18 Ann. Cas., 907. It can be deemed to be no less subject, on command of a state tribunal, to the duty to give information appropriate to an inquiry pending there. The present investigation is not a regulation of interstate commerce and it burdens the commerce no more than the obligation owed by all, even those engaged in interstate commerce, to comply with local laws and ordinances, which do not impede the free flow of commerce, where Congress has not acted. Smith v. Alabama, 124 U. S., 465, 31 L. ed., 508, 8 S. Ct., 564, 12 Inters. Com. Rep., 804; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S., 380, 56 L. ed., 240, 32 S. Ct., 152; Minnesota Rate Cases (Simpson v. Shepard), 230 U. S., 352, 402-412, 57 L. ed., 1511, 1542, etc."

If this is true of one which is purely and certainly beyond all dispute, legal or factual, an interstate carrier it is a fortiori true of an intrastate peddler.

The court's statement on page 307 of the Slattery case that

> "This court has often recognized that the reasonableness of the price at which a public utility company buys the product which it sells is an appropriate subject of investigation when the resale rates are under consideration, and that any relationship between the buyer and seller which tends to prevent arm's length dealing may have an important bearing on the reasonableness of the selling price,"

was later qualified and at the same time clarified and detailed by the statement on page 308 that

> "The price itself may be found to be so exorbitant as to persuade that the bargaining was not at arm's length. Corsicana Nat. Bank v. Johnson, 251 U. S., 68, 64 L. ed., 141, 40 S. Ct., 82, supra."

Actually there is on this basis no difference between the Slattery case and the case at bar.

The only apparent difference between these two cases is the lack of corporate affiliation in the case at bar but that difference is cared for by the last preceding quotation. The lack of arm's length bargaining is as complete in the one case as in the other; in the former it is measured by corporate affiliation, in the latter by exorbitant price. The whole or a part of the metropolitan area of Chicago, Illinois, in the Slattery case may be a sufficiently populous and attractive an area to the expansion of the gas utility business to command its own market and its own competitive bargaining; but such a command is beyond the reach of the consumers of the city of Portsmouth, Ohio, especially in view of the added requirement of the recent federal Natural Gas Act that no utility described in that law may extend its lines to territory already being served by another utility without a cer-

tificate of convenience and necessity from the Federal Power Commission, and this of course assumes an alternate and otherwise available source of gas supply.

We thus see that over a period of years the growth of regulation always seems to be one step behind the growth of the regulated industry. When the gas utility companies were small regulation was purely local but as they grew in size state administrative bodies were handicapped in regulation by retention of the original interpretation of the purpose of constitutional safeguards over interstate commerce. The first break in that handicap was the recommendation by this Court of the extension of the principle of looking behind corporate entities. The second step was the recognition by this Court of the doctrine of arm's length bargaining, and the third step was the statement by this Court that the lack of arm's length bargaining may lie as distinctly in evidence of exorbitant price as in evidence of intercorporate affiliation. The case at bar falls squarely within the second and third of these steps even if it be conceded argumentatively that United Fuel's business herein constitutes interstate commerce.'

This change in attitude has become so progressively noticeable that it recently caused the court in People's Natural Gas Company v. Federal Power Commission, 127 Fed. (2nd), 153, 158-159, to state that:

> "It is true that in recent years the (Supreme) Court has widened its view of what "affects" interstate commerce and supports federal regulation, and also its view of what state interferences with interstate commerce are permissible in the absence of federal regulation."

If that is true of interstate commerce it is a fortiori true of the case at bar.

(3) The Law of Interstate Commerce Generally.

When we consider the commerce clause of the federal Constitution generally, we find that those coming into a state must abide by reasonable regulations and that it is not reasonable to assume that a state statute, affecting interstate commerce and intrastate commerce alike, is directed against interstate commerce, particularly if it does not unreasonably obstruct the freedom of that commerce among the states. Lake Shore and Michigan Southern Railway v. State of Ohio ex rel., etc., 173 U. S., 285, 301-303, and the Slattery case, supra (302 U. S., 300). Within these bounds the relevant sections of the Ohio law and the commission's orders clearly fall.

We also find that whether a state has duly and properly exercised its power of regulation is a matter to be decided in view of the facts in each particular case (Eliza Jane Hall, etc., v. DeCuir, 95 U. S., 485; Wisconsin M. and P. Railroad v. Jacobson, 179 U. S., 287, 297, 302; Ware and Leland et al. v. Mobile County, 209 U. S., 405, 409; and A. L. A. Schechter Poultry Corp. v. United States, 295 U. S., 495), and that such constitutional conceptions as interstate commerce, due process and equal protection are formulae to be determined by the gradual process of inclusion and exclusion; there is no set rigidity prohibiting consideration of each case on its own facts. Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S., 453, 467. We further find that the orders of appellant commission, dated April 18, 1935, and May 29, 1935, did not and do not deny or obstruct the right to engage in interstate commerce (W. N. Barrett, etc., v. City of New York et al., 232 U. S., 14, 31)

since there was no tax levied, no revenue sought, no impediment imposed and no burden or obstruction laid, only a rule indicating that as one comes into the state of Ohio he must conduct his business justly and reasonably.

These principles have so grown and matured in our jurisprudence that although there may at first blush seem to be inconsistent decisions we find on closer scrutiny that it is possible to trace backward, for example, from such recent decisions as E. Pat Kelly v. State of Washington et al., 302 U. S., 1, to the earliest cases without finding any deviation from the basic idea that even if a transaction constitutes interstate commerce, Congressional inaction thereon is not per se a bar to all state legislation touching on that subject nor is Congressional action a bar unless it fully occupies the field. See also The License Cases (Thurlow v. Massachusetts), 5 Howard, 504, 579-583, and Parkersburg and O. Trans. Company v. Parkersburg, 107 U. S., 691.

Or let us start with Smith v. Alabama, 124 U. S., 465, 477, wherein this court, in holding that state regulations may incidentally affect interstate commerce so long as Congress is silent, said:

> "But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether ex contractu or ex delicto, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular state does not govern that

> relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject,"

and bring that principle down through Illinois Natural Gas Company v. Central Illinois Public Service Company, 314 U. S., 498, which, in spite of its primary basis in the Natural Gas Act, held that:

> "In other cases the court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." (Citing various authorities.)

In these cases it is significant, as in General Oil Company v. Crain, 209 U. S., 211, 229, 231, and Western Live Stock, etc., v. Bureau of Revenue, 303 U. S., 250, 254, that even though regulation of interstate commerce is primarily in Congress, still if there is a meritorious reason for a local regulation or tax it will be sustained even though it has a direct effect on interstate commerce so long as the regulation is not directed primarily at and does not unduly burden that commerce which either actually or seemingly is interstate. So is this true even though Congress has not acted or has acted in only a part of the field and there is consequently a question whether federal inaction or local regulation will prevail. See Lone Star Gas Company v. State of Texas et al., 304

U. S., 224, Duckworth v. Arkansas, 314 U. S., 390, and Pennsylvania Milk Control Board v. Eisenberg Farm Products, 306 U. S., 346. This discussion of these principles would be necessary if United Fuel's transactions in the case at bar constituted interstate commerce, but as it is, these principles are simply an added bulwark to the commission's action even if we assume arguendo that interstate commerce exists herein.

There was never any lack of power in the states to regulate commerce; if there had been there would have been no need for what is referred to as the commerce clause of the Constitution. The primary purpose of that clause is not so much to bar the states of the use of their regulatory powers as it is to insure through federal action uniformity of regulation in matters of national interest and freedom from conflicting state regulation. (See Interstate Commerce Commission v. B. & O. Railroad, 145 U. S., 263, and New York Central and H. R. Railroad v. United States, 212 U. S., 481, 496.) If there is no such interest and no such confliction, the states are free to act; but even if there is such an interest, it must be found that the state regulation imposes undue burdens, interruptions or obstructions on interstate commerce before the regulation is held to be invalid. See Santa Cruz Fruit Packing Company v. National Labor Relations Board, supra (303 U. S., 453, 466), and Western Union Telegraph Company v. James, 162 U. S., 650, 661, 662.

The intention has never been to permit a trade or profession to assume greater importance in the eyes of the law than does the public interst affected thereby even though public interest is measured in terms of one medium-sized city. If there is no national interest, there is

no power in Congress to legislate; if there is no conflict with interstate commerce, there is no jurisdiction in the courts to hold invalid a state regulation on the basis of interstate commerce. This court has so held in Missouri, K. & T. Railroad v. Haber et al., 169 U. S., 613, 627, when it stated:

> "Nor is the statute of Kansas to be deemed a regulation of commerce among the states, simply because it may incidentally or indirectly affect such commerce. Hennington v. Georgia, 163 U. S., 299, 317 (41:166, 174); New York, N. H. & H. Railroad Co. v. New York, 165 U. S., 628, 631 (41:853, 854); Chicago, Milwaukee & St. Paul Railway Co. v. Solan, 169 U. S., 133 (ante, 317); Richmond & Alleghany Railroad Co. v. R. A. Patterson Tobacco Co. in 169 U. S., 311 (ante, 385), and authorities cited in each case. Although the power of Congress to regulate commerce among the states, and the power of the states to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and state governments, or produce any conflict between the two governments in the exercise of their respective powers, need occur, unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the state legislation may refer."

Furthermore, if we assume again that the dealings between United Fuel and the Portsmouth Gas Company constitute interstate commerce, and if we are willing to look at those transactions as did the District Court in the case at bar without seeing any dealings of United Fuel with its same facilities at New Boston and Ironton, Ohio, it still must be borne in mind that the laws of the state of Ohio, and the orders of appellant commission based thereon, place no impediment on such commerce,

restrain no movement thereof and lay no burden thereon. The only result of the commission's orders is to require a justification for a course of action which is of interest to only one community. Congress had not acted and no court has jurisdiction to establish a fair distribution rate. No other body with power to act was interested in the rates paid by the gas consumers in the city of Portsmouth. Only the state of Ohio through appellant commission could relieve against a situation entirely and clearly local in character. This it did.

In closing, it is idle to conjecture the nature of the evidence that United Fuel would have produced or of the action that the commission might have taken thereafter, but the facts of the case at bar are such that it is something more than idle speculation to assume that if United Fuel is compelled to reconcile a price of 37 cents to the Portsmouth Gas Company with a price of 22.035 cents to a company affiliate, it is far more troubled by the effect upon it of some future order of the commission than it is by the thought of having to do no more than produce its records. The propriety of such type of interim order is discussed in Rochester Telephone Corporation v. United States, 307 U. S., 125, in the Slattery case, supra (302 U. S., 300), and in East Ohio Gas Company v. Federal Power Commission, 115 Fed. (2nd), 385, which cited and followed the Rochester Telephone case. None of these three cases is as strong, however, as the case at bar because herein it must once again be borne in mind that the transactions to which the orders of appellant commission are directed are not interstate commerce.

II.

AT NO TIME IN THE PROCEEDINGS BEFORE THE COMMISSION WAS UNITED FUEL DENIED DUE PROCESS OF LAW.

(Assignments of Error, Nos. 1, 10, 11, 12, 13, 14.)

Since it must be borne in mind that the action of a state commission in setting rates is of a legislative rather than judicial character (Prentis v. Atlantic Coast Line Company, 211 U. S., 210), four matters tend to relieve from the necessity of a protracted discussion of United Fuel's claim that it has been denied due process of law. These four matters are: (1) The complete protection on all such matters afforded to all participants and parties before appellant commission under the statutes of Ohio set forth in Appendix 3 attached to this brief; (2) the general law on the subject of due process, particularly concerning resultant costs; (3) the complete failure of United Fuel to press any such claim with the equally complete absence of any finding of lack of due process by the District Court in its decision, and (4) the fact that the proceedings before appellant commission were not allowed to reach a point wherein it was possible to deny due process to any party before United Fuel instituted its action in the District Court below. These matters will be discussed in the order just given.

In Federal Power Commission v. Natural Gas Pipe Line Company, 315 U. S., , 86 L. ed., 699, 704, this court recently upheld the constitutionality of the Federal Natural Gas Act and the orders of the Federal Power

Commission made thereunder and stated that there can be no doubt, under either the Fifth or Fourteenth Amendments, of the propriety of the regulation of the price of gas distributed through pipe lines for public consumption. If that statement is true of the Federal Power Commission acting under the Natural Gas Act, it must be correspondingly true of the Ohio commission acting under the Ohio law prior to the enactment of the Natural Gas Act, particularly in view of the unusual facts of this case. The fifth syllabus of that case states that:

> "The power of a state or of Congress, for protection of the public interest, to regulate price, extends, under the Constitution, to wholesale, as well as retail, sales."

As far back as Barbier v. Connolly, 113 U. S., 27, it was held that the Fourteenth Amendment was not designed to interfere with the police power of the states. It was more recently stated in Great Northern Railroad v. State of Washington, 300 U. S., 154, 160, that reasonable regulation of utilities does not violate the equality requirement of the Fourteenth Amendment (in connection with which it should be noted that the relevant paragraphs of Section 614-2, Ohio General Code, apply to all alike). And about midway between these decisions this Court, in considering an Ohio statute dealing with industrial relations, stated in Rail and River Coal Company v. Yaple et al., 236 U. S., 338, that the right to move to rescind or modify, or to rehear, the right of appeal and stay of execution are adequate protection to constitute and insure due process. Moreover, in another Ohio case, J. P. Grubb v. Public Utilities Commission of Ohio, 281 U. S., 470, 474, which involved the same appeal statute

which United Fuel could have made use of, this Court said that the laws of Ohio provide for "a review of formal orders of the (appellant) commission by the Supreme Court of the state—a judicial review culminating in adjudgment." The third syllabus of that case is of material interest herein in stating that

> "The commerce clause of the federal Constitution does not operate to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation, or attempted regulation, of interstate commerce."

Needless to say, United Fuel sought to exercise none of those enumerated statutory rights, all of which were established long prior to the commencement of its action herein. It chose instead to go into the federal courts and assert that an unexercised right in the state courts was so inadequate as to deny it due process even though this Court had held some years previously in the Grubb case that right to be adequate.

(2) If anything more need be added on the subject of due process it may be stated that it has already been held that the expenditure of a large sum of money to comply with an order of a state regulatory body is not of itself enough to warrant the granting of federal injunctive relief; it is indeed no more than an incident to the transaction of the type of business in which United Fuel is engaged. See the Slattery case, supra (302 U. S., 300), East Ohio Gas Company v. Federal Power Commission, supra (115 Fed. (2nd), 385), Lake Shore and Michigan Southern Railway Company v. State of Ohio, supra (173 U. S., 285), and Petroleum Exploration, Inc., v. Kentucky Public Service Commission, 304 U. S., 209, 222-223. In this last case appellant produced and bought natural

gas in Kentucky. Its situation was identical with that of United Fuel at Portsmouth in that its business was wholesale and it consequently was not connected directly with the distribution rate in question. The Kentucky commission ordered it to present evidence as to the reasonableness of its wholesale rates and to make its records available. The denial of injunctive relief by a statutory three-judge federal district court was affirmed by this Court on appeal.

This Court said:

> "Fifth: Our conclusion that this is not a threatened injury justifying intervention is strengthened by a balancing of conveniences. By the process of injunction the federal courts are asked to stop at the threshold, the effort of the Public Service Commission of Kentucky to investigate matters entrusted to its care by statute of that commonwealth obviously within the bounds of state authority in many of its provisions. The preservation of the autonomy of the states is fundamental in our constitutional system. The extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant. 'Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting colore officii in a conscientious endeavor to fulfill their duty to the state.' The Kentucky statute in question contains detailed provisions for hearings and judicial review. These include notice, procedural rules before the commission, right to counsel, production of evidence, service of orders, rehearing, process for parties and witnesses, depositions, record of proceedings, review of orders by court and appeal to the state court of last resort. The compulsory and punitive powers of the commission are exercised through judicial process. When the only ground for interfering with the state procedure is the cost of preparing for a hearing, there is no occasion for equitable intervention."

The trend to this conclusion from the earlier Landon, Barrett and Attleboro cases, all supra, was clearly referred to by the United States Circuit Court of Appeals in People's Natural Gas Company v. Federal Power Commission, also supra (127 Fed. (2nd), 153).

(3) We limit this portion of the discussion to pointing out that no finding of lack of due process of law was made by the District Court probably because the existence of the various statutes of the state of Ohio which are appended to this brief precluded the making of any such finding. Moreover, the nature of the commission's orders make it extremely questionable in the light of the Slattery case, supra (302 U. S., 300), East Ohio Gas Co. v. Federal Power Commission, supra (115 Fed. (2nd), 385), and Rochester Telephone Co. v. United States, supra (307 U. S., 125), whether the District Court should not sua sponte have dismissed this case when it was first submitted.

(4) In Kansas State Corporation Commission v. Wichita Gas Company, 290 U. S., 561, 569, this court was confronted with a situation wherein in the course of a general rate investigation the state commission therein involved, ordered certain gas distribution companies to refrain, inter alia, from setting up as operating costs more than 30 cents per M c. f. for gas purchased from an interstate carrier and from setting up any and all service charges to a common affiliated company. Injunctive relief was sought by the carrier and distribution companies alike on the same grounds put forward by United Fuel in the case at bar, viz., conflict with the commerce and contract clauses of the United States Constitution and violation of the due process clause of the

Fourteenth Amendment. The granting of relief was reversed by this Court on the ground that the orders of the Kansas commission, being for the purpose of obtaining information to be used later in the establishment of reasonable rates, were legislative in character and equitable relief was consequently premature. The proceeding before appellant commission in the case at bar had not ever reached that advanced stage when United Fuel instituted its action herein.

Even though due process of law is not measured in the case at bar by the same strict test which confronts it in a judicial tribunal (Lake Erie and Western Railroad v. Illinois Public Utilities Commission, ex rel., etc., 249 U. S., 422, 424), the phrase itself, if it has any meaning at all, requires rather than impedes an inquiry why sales at one point to an affiliate are consummated at 22.035 cents per M c. f. and at a nearby point to a stranger at 37 cents per M c. f. "Due process of law" may no more than "arm's length bargaining" be used as a verbal accessory after the fact.

III.

THE TWO SAID ORDERS OF THE COMMISSION HAVE NOT IMPAIRED EITHER THE CONTRACT BETWEEN UNITED FUEL AND THE PORTSMOUTH GAS COMPANY OR ANY CONTINUATION THEREOF TO DATE.

(Assignments of Error, Nos. 1, 3, 4, 10, 11, 12, 13, 14.)

As seen in Federal Power Commission v. Natural Gas Pipe Line Company, supra (315 U. S., , 86 L. ed., 699), the power of both state and federal governments to regulate the price of gas distributed through pipe lines for public consumption has been too long and too consistently recognized as a proper subject of regulation under the Fifth and Fourteenth Amendments to admit of doubt at this late date. Any such regulations fall within the category of the police power and as such are but another name for the power of government. Indeed, the sections and clauses of the United States Constitution and its various amendments called upon by United Fuel in the case at bar to justify its reticence in opening its records have recently been denied by this court to be "a guaranty of untrammeled freedom of action and of contract." See Virginian Railway Company v. System Federation, No. 40, 300 U. S., 515, 558.

There is no problem of rights and duties being in pari materia when there arises a seeming conflict between the constitutionally protected right of private contract and the power and duty of a state to exercise its police power. In the case of any such assumed conflict, the due exercise of the police power prevails. The involved private rights

and public power are not equal and where they clash the individual right (to contract) is the one which must give way as in the case at bar where United Fuel sells to an affiliate for 22.035 cents and to a so-called stranger at the tag end of the list for 37 cents.

This court having long since held that the police power of a state may place restraints on the power to enter into private contracts (Rail and River Coal Company v. Yaple et al., supra (236 U. S., 338), and Union Dry Goods Company v. Georgia Public Service Corporation, 248 U. S., 372) has since then held in Midland Realty Company v. Kansas City Power and Light Company, 300 U. S., 109, that action by a state commission in setting a rate different from that of a pre-existing contract does not violate either the contract or due process clauses of the United States Constitution. It is, moreover, settled law that before this court will interfere with a state statute limiting in an exercise of the police power the right of contract, there must not only be a clear case of abuse but also, this Court, in making such a determination, should not exercise a too precise line of reasoning. Mutual Loan Company v. Martell, 222 U. S., 225.

When we consider legislative rather than judicial limitation on the power of states to regulate businesses within their geographic bounds, it is well established that the intention of Congress to exclude states from exercising their police power must be clearly manifested. Napier, Attorney General, etc., v. Atlantic Coast Line Railroad, 272 U. S., 605, 611; Reid v. Colorado, 187 U. S., 137, 147; Mintz v. Baldwin, 289 U. S., 346; Kelley, etc., v. State of Washington ex rel., etc., supra (302 U. S., 1, 9-14). In connection with these various principles we

point out not only that it is clearly no abuse of power to inquire into the obvious discrepancy of United Fuel's charges while operating in Ohio both wholesale and retail from the same facilities but also that in so far as Congress is concerned, no federal action even remotely connected with the situation found in the case at bar was taken until the ordinance in question was four and a half years expired and the present litigation was a little over three years old; then, its action was too late.

In many corresponding situations this state power of regulation has been upheld. In Dayton Power & Light Company v. Public Utilities Commission of Ohio, 292 U. S., 290, there was an appeal to this court from a distribution rate order of appellant commission. While the fifth syllabus of that case, when applied to the case at bar, states clearly that United Fuel herein has not sustained the burden of proof resting on it we wish primarily to point out that this Court said on page 308:

> "Even so the burden of proof was on the buyer of the gas to show that in these transactions with the affiliated seller the price was not higher than would be fairly payable in a regulated business by a buyer unrelated to the seller and dealing at arm's length. Western Distributing Company v. Public Service Commission, 285 U. S., 119, 124, 76 L. ed., 655, 658, 52 S. Ct., 283."

It is respectfully submitted that if affiliates must show that they are not dealing at prices over and above what strangers would pay, it is at least equally true that a carrier must show why it charges more to a stranger than it sees fit to charge to its affiliate; if this conclusion is incorrect then our system of jurisprudence does recognize a vested right to do a manifest wrong.

A state statute requiring certain inspection of oils and fluids was approved many years ago in E. E. Patterson v. Commonwealth of Kentucky, 97 U. S., 501. The second syllabus of that case states that:

> "The right conferred upon a patentee and his assigns to use and vend an oil for illuminating purposes, created by the application of a patented discovery must be exercised in subordination to the police regulations which the state established by such statute."

If property derived from a federally patented right may be subjected to a state inspection law, it is illogical to hold that questionable participation in interstate commerce may not be equally subservient to a state regulation especially in view of the circumstances of the case at bar.

Another case in point is Louisville and N. Railroad v. Commonwealth of Kentucky, 161 U. S., 677, 700, which involved the constitutionality of a state statute prohibiting railroads from buying up parallel and competing lines. In upholding the statute, this Court approved the general principle "that where the police power is invoked in good faith for the prohibition of a practice which the Legislature has declared to be detrimental to the public interest it will be sustained whenever it can be done without the impairment of vested rights." Assuming that the right to contract might be classified as a vested right, it still does not follow that there is or can be a vested right to charge an affiliate 22.035 cents and a stranger 37 cents.

Other cases of interest are Alabama v. King and Boozer, etc., 314 U. S., 1, wherein a state sales tax was upheld even though it was ultimately paid by the United

States Department of War, and Memphis Natural Gas Company v. Beeler, Attorney General etc., 315 U. S., , 86 L. ed., 745, 750, wherein a non-discriminatory state tax upon an interstate business was approved; it would also seem to follow that if a tax in Virginia on the sale of bread baked in West Virginia is proper as was held in Caskey Baking Company v. Commonwealth of Virginia, 313 U. S., 117, 119, the regulation in Ohio of gas produced in West Virginia and Kentucky which might be used to bake bread is equally proper. See also Clark et al. v. Poor et al., 274 U. S., 554. We submit that if the orders in question of appellant commission impair United Fuel's contract so does every order of the Federal Power Commission under the Natural Gas Act also impair every contract affected thereby.

We close this portion of the discussion by referring the court to Nebbia v. People of the State of New York, 291 U. S., 502, 523, 527, 539. That case related to a phase of regulation of the milk industry in the state of New York, which industry in that state, like the gas industry in Ohio, has long been subject to regulation. In holding valid the state statute regulating the retail selling price for milk, this Court said:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; the government can not exist if the citizen may at will, use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

Another excerpt from that decision is that:

> "The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power."

We wish particularly to point out that this Court said that:

> "The Constitution does not guarantee unrestricted privilege to engage in a business or to conduct it as one pleases."

And also that it said:

> "The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at liberty or upon any substantial group of people."

There has been, we respectfully submit, no impairment by appellant commission of any contract that United Fuel may have entered into. The purposes of the United States Constitution are set forth in the preamble thereto and the various articles, sections and clauses of that Constitution and its various amendments are no more than requirements and restrictions seeking to insure the purposes set forth in the preamble. That preamble seeks statedly, to "establish Justice" and to "promote the general Welfare" but neither of these purposes will be served by requiring the Portsmouth Gas Company to pay fifty percent more for its gas, if there is any left after affiliates have been supplied. In any event, appellant commission is entitled to know why this is being done.

IV.

THE FEDERAL NATURAL GAS ACT HAS NO BEARING AT ALL ON THE CASE AT BAR.

(Assignments of Error, Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14.)

The municipal rate ordinance in question was enacted by the city of Portsmouth on February 24, 1932. Its life was the balance of the franchise period, two years. The appeal of the Portsmouth Gas Company to appellant commission was prompt and, subsequent thereto, the commission found that the ordinance rate was confiscatory. Significantly, it also found that it could not determine a reasonable substitute rate without further information relative to the wholesale rate charged by United Fuel to the Portsmouth Gas Company. Hence the requirement that United Fuel produce sufficient evidence and records "to prove a reasonable and just rate to be charged by it to the Portsmouth Gas Company." This order was somewhat modified as to findings by the commission's order of May 29, 1935, but the requirements directed to United Fuel were unchanged.

Five or six weeks later United Fuel went into the local District Court and instituted the proceedings which are the basis of this appeal. Three years later the Natural Gas Act (June 21, 1938, c. 556, sec. 1, 52 Stat., 821; 15 U. S. C. A., ch. 15B, sec. 717 et seq.) was passed.

From such a chronological narrative of events herein it is obvious that there can not possibly be any doubt that the Natural Gas Act is inapplicable to the determination of either a distribution rate for the city of Ports-

mouth or a wholesale rate between United Fuel and the Portsmouth Gas Company. Any one of four separate counts removes the Natural Gas Act as a factor in the case at bar. (1) It was enacted three years after the inauguration of this case in the District Court, six and a half years after the Ohio commission's jurisdiction was first invoked; (2) the Natural Gas Act is not per se retrospective in operation; (3) the establishment of rates under the Natural Gas Act are statedly effective only from that date onward, not into the past even for the definite period of a distribution rate ordinance; (4) the availability of records filed with the Federal Power Commission as required by the Natural Gas Act does not, and can not, make such records controlling with regard to a period from three to six and a half years prior to the passage of that Act.

(1) The Ohio statutes quoted in Appendix 3 attached to this brief, especially Section 614-46, show that when appellant commission establishes a substitute rate it shall be "during the period so fixed by ordinance," viz., February 24, 1932 to February 24, 1934. The entire period ended nearly four and a half years before the Natural Gas Act ever became a law. It should furthermore be noted that there is no hint at all of retrospection in the Natural Gas Act; since its provisions were to become effective only after the passage of the law, the entire import of its provisions is directly away from the past. It is futile to argue that the jurisdiction of appellant Ohio commission was nullified by a statute passed six and a half years after appellant commission's jurisdiction was first invoked; we urge this particularly when we consider that if it had not been for the unfortunate death of two United States judges the case at bar would have been de-

cided in the District Court years before the Natural Gas Act ever found a place on the statute books of this country.

(2) It must also be borne in mind as conclusive evidence of the complete lack of intention to make the Natural Gas Act retrospective that any rate established by the Federal Power Commission thereunder shall be effective only from and after the date of its finding under such act. Consequently, since the period of the rate ordinance in question was from February, 1932, to February, 1934, and since appellant commission was directing its inquiry to that period, it follows that even if the Federal Power Commission had had jurisdiction and had had a gate rate ready for use on the day the Natural Gas Act became law, its action would still have been from four and a half to six and a half years too late.

(3) We also point out that the District Court in neither its decision of October 3, 1941, nor its decree of January 16, 1942, made any statement or finding that the Federal Power Commission had exercised in the premises any jurisdiction that might have been conferred upon it by the Federal Natural Gas Act; any such finding, had it been made, would have been even further out of date than was the passage of that law. The point even further is that if the Natural Gas Act had been passed prior to the appeal of the Portsmouth Gas Company to appellant commission in the early part of 1932, appellant commission would still have had full jurisdiction in the premises unless the Federal Power Commission endeavoring to exercise powers under the Natural Gas Act had not only found that it had jurisdiction dating back to a time prior to the creation of its jurisdiction but had also determined as to United Fuel a "reasonable and just rate to be

charged by it to the Portsmouth Gas Company" during that prenatal biennium of Portsmouth's ordinance, and this Court had in the teeth of the Natural Gas Act, approved any such finding and determination.

There have been several decisions of this court bearing out the impossibility of any such contention. As long ago as Western Union Telegraph Company v. James (162 U. S., 650, 660-661), it was held that in frequent cases congressional silence is not equivalent to express enactment and especially is this true where state police power is used to insure prompt and faithful performance of a duty within a state. Hence state action in such situations is proper in the absence of action by Congress. From this humble beginning the principle moved on in Missouri K. & T. Railroad v. S. O. Harris, 234 U. S., 412, 417-421, wherein there was in issue the validity of a state statute granting a small attorney's fee in the case of minor litigation successfully conducted against a railroad. This Court said that while certain principles of law therein discussed were sound,

> "it is equally well settled that mere creation of the Interstate Commerce Commission and the granting to it of a measure of control over interstate commerce does not of itself and in the absence of specific action by the commission or by Congress itself, interfere with the authority of the states to establish regulations conducive to the welfare and convenience of their citizens, even though interstate commerce be thereby incidentally affected so long as it be not directly burdened or interfered with. Missouri Pacific Railroad Company v. Larabee Flour Mills Company, 211 U. S., 612, 613, 53 L. Ed., 352, 361, 29 S. Ct. Rep., 214; Southern Railway Company v. Reid, 222 U. S., 424, 437, 56 L. Ed., 257, 260, 32 S. Ct. Rep., 140."

The principle was again utilized in Smith et al. v. Illinois Bell Telephone Company, 282 U. S., 133, 159-160, where in the course of a telephone rate case the courts held it proper for a state commission to establish a rate of depreciation even though the Interstate Commerce Commission had a corresponding matter under consideration and would rule thereon at no distant date. The matter then came squarely to a head in Northwestern Bell Telephone Company v. Nebraska Railroad Commission, 297 U. S., 471, 478-479, 480. While the Interstate Commerce Commission and the Federal Communications Commission therein were successively holding hearings looking to the establishment of rates of depreciation for telephone companies, the Nebraska commission set such a rate for a period covering in part the period of time which the two federal agencies had under consideration. In holding that the Nebraska commission was not ousted of jurisdiction by the pending proceedings before the two federal commissions, it was said: "The (federal) statute did not envisage immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the commission would be prepared to act. It can not be supposed that Congress intended by the amendment to Section 20(5) to preclude all regulation, state and national, of depreciation rates for the telephone companies, for an indefinite time until the Interstate Commerce Commission could act administratively to prescribe rates" (citing various authorities).

The fears of this Court expressed in the last sentence of the preceding quotation have been amply borne out in the case at bar. And particularly is this so when we con-

sider that this Court said further in the Northwestern case that:

> "In any event, we think that Section 20(5) cannot be read as authorizing the Interstate Commerce Commission to supplant state power to regulate depreciation rates of telephone companies except by prescribing a rate administratively determined by the commission itself. A direction that the commission, as soon as practicable, prescribe depreciation rates, is hardly to be read as authority to permit the telephone companies to fix the rates for themselves in defiance of state power. The doubtful constitutionality of the statute if so construed precludes our acceptance of such a construction."

This principle has been followed in other fields of regulation. In South Carolina State Highway Department v. Barnwell Brothers, Inc., et al., 303 U. S., 177, 185, 190-192, this Court, in upholding a state law imposing a twenty thousand pound load limit on all common carriers by motor vehicles interstate and intrastate alike, stated that:

> "Notwithstanding the commerce clause, such regulation in the absence of congressional action has, for the most part, been left to the states by the decisions of this court subject to the other applicable constitutional restraints."

Later in H. P. Welch Company v. State of New Hampshire, 306 U. S., 79, it was held that a state might limit the hours a driver of a motor vehicle for hire might work and that such a statute was not superseded by a federal statute on the same subject until the proper federal administrative agency had acted under that law and its regulation had become effective. To the same effect, see People of the State of California v. Thompson, 313 U. S., 109, 115-116.

We also wish to call the attention of the Court to Eichholz v. Missouri Public Service Commission, 306 U. S., 268, 273, involving a statute empowering the Missouri Public Service Commission to grant certificates to common carriers by motor vehicle engaging in interstate commerce. This Court held that the Missouri commission had jurisdiction to cancel such a certificate even though the holder had an application for a corresponding certificate pending before the Interstate Commerce Commission. Syllabus 5 of that case states that:

> "In the absence of the exercise of federal authority over interstate commerce, and in the light of local exigencies, a state is free to act in order to protect its legitimate interests in the regulation of intrastate commerce even though interstate commerce is directly affected thereby."

Nor is this principle peculiar to common carriers by motor vehicle alone. In the car transfer case, Missouri Pacific Railroad v. Larabee Flour Mills Company, 211 U. S., 612, 623, this Court said:

> "In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce, and a delegation of that control to a commission, necessarily withdraws from the state all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission, the control of the state over these incidental matters remains undisturbed."

(4) Even if the Natural Gas Act had a retrospective operation, which it does not have, lack of any action thereunder by the Federal Power Commission would prevent that statute from having any applicability to the case at bar and although the District Court seemed to indicate that appellant commission would be at liberty to call on the Federal Power Commission for testimony or records, no attempt was made to point out how any such information or records received by the Federal Power Commission some time subsequent to June, 1938, would be either controlling or relevant in the case of a two-year period commencing six and a half years prior to the receipt of such information and records, if any, by the Federal Power Commission.

CONCLUSION.

In conclusion and by way of summary, appellants say that (1), in view of the fact that United Fuel wholesales and retails its gas from the same line at the same time and to adjoining and nearby communities in Ohio, it is and was at the time in question both a gas company and a pipe-line company within the contemplation of the relevant statutes of the state of Ohio, and as such and with regard to the facilities involved in the case at bar, it is and has not been engaged in interstate commerce, but to the contrary is subject to the jurisdiction of appellant commission in the premises; (2) in view of the fact that United Fuel sells gas on a priority footing as to supply and demand to an affiliate at 22.035 cents per M c. f. and at the same time and on a residual footing as to supply and demand to the unaffiliated Portsmouth Gas Company at 37 cents per M c. f., there has been no arm's length

bargaining between United Fuel and the Portsmouth Gas Company; and the orders of appellant commission dated April 18, 1935, and May 29, 1935, respectively, do not deny United Fuel due process of law or impair its contract with the Portsmouth Gas Company, but to the contrary any such contract requires investigation by appellant commission, as the only existing agency in the premises on the alternative of a complete denial of protection of public interest; (3) due process of law has not been denied United Fuel nor has its contract been impaired; (4) the federal Natural Gas Act has no bearing on or connection with the case at bar. The transactions between United Fuel and the Portsmouth Gas Company are neither factually nor legally interstate commerce; not even the test of arm's length bargaining can change that conclusion. But if these transactions do constitute interstate commerce the orders of appellant commission are not an unwarranted, illegal or unconstitutional regulation thereof. In either event, the statutes of the state of Ohio (appearing in Appendix 3 hereto) show beyond question both that United Fuel has not been denied due process of law, and also that its contract with the Portsmouth Gas Company has not been impaired. The Natural Gas Act obviously has no bearing at all on this case.

The decision and order of the District Court should be reversed and United Fuel's action dismissed.

Respectfully submitted,

THOMAS J. HERBERT,
Attorney General of Ohio,
KENNETH L. SATER,
Special Counsel for The Public Utilities Commission of Ohio,
Counsel for Appellants.

APPENDIX 1.

Before The Public Utilities Commission of Ohio.

No. 7750—In the matter of The Portsmouth Gas Company's complaint of, and appeal from, Ordinance No. 8, Year 1932, passed by the council of the city of Portsmouth, Scioto County, State of Ohio, February 24, 1932, "fixing the rate or rates to be charged to consumers for natural gas distributed by The Portsmouth Gas Company, a corporation distributing natural gas in the City of Portsmouth, Ohio."

This day, after full hearing and argument by counsel, this matter came on for consideration upon the complaint and appeal by The Portsmouth Gas Company from the ordinance passed February 24, 1932, by the council of the city of Portsmouth, Ohio, fixing and prescribing as maxima the following rates for the furnishing of natural gas service to the citizens, public grounds and buildings of the city of Portsmouth, Ohio, for the duration of the franchise of said The Portsmouth Gas Company passed June 21, 1899, to wit:

45¢ per 1,000 cubic feet with a discount of 5¢ per 1,000 cubic feet, if bills are paid within ten days after the rendition of the monthly statement by the gas company.

Monthly minimum charge.....50 cents

and the testimony and exhibits offered and introduced in evidence upon such hearing and the argument of counsel.

The appellant elected to and under an undertaking duly filed herein has charged during the pendency of this proceeding the following schedule of rates which was in

effect immediately prior to the effective date of the ordinance complained of and appealed from:

First 1,000 cu. ft. or less per month	85¢
Over 1,000 cu. ft. per month	60¢ per M cu. ft.
Discount for prompt payment	5¢ per M cu. ft.

The appellant produces no gas and purchases from the United Fuel Gas Company all of the gas which it distributes under a contract which, with an adjustment for leakage, prescribes a price of 37 cents per 1,000 cubic feet.

By order, made and entered in this proceeding on June 18, 1934, the said United Fuel Gas Company was made a party and directed to file a copy of the contract whereunder it supplies gas to the appellant. No proceeding was instituted seeking a reversal of this order.

The appellant, The Portsmouth Gas Company, offer in evidence its record tending to show that the cost of rendering service in the city of Portsmouth, exclusive of cost of purchasing gas, taxes and the necessary allowance for depreciation, for the fiscal years ended February 29, 1932, and February 28, 1933, was as follows:

	1932	1933
Transmission and Distribution:		
Operation	$15,492.04	$16,359.16
Maintenance	36,147.50	19,900.51
Commercial Expense	19,199.35	19,077.12
New Business Expense	16,416.77	10,394.05
General Expense:		
Operation	46,628.43	41,948.81
Maintenance	1,372.45	1,246.02
	$135,257.04	$108,925.67

The United Fuel Gas Company has presented no evidence tending to show the cost of supplying gas wholesale to The Portsmouth Gas Company.

The commission coming first to determine the valuation of the property of the appellant, The Portsmouth Gas Company, actually used and useful, for the furnishing of natural gas service, by said company, to consumers and to the public in the city of Portsmouth, Ohio, and after considering the evidence and exhibits offered at said hearing, and having completed an independent inventory and valuation of said property, and being fully advised in the premises, finds and ascertains the value of the several kinds and classes of the property of The Portsmouth Gas Company used and useful for the convenience of the public and for the natural gas service to its consumers and to the public in the city of Portsmouth, Ohio, and of said property as a whole, as of February 24, 1932, to be as set forth in the following summary (the grand totals of which are reproduction costs $761,939, depreciation $94,151, and present value $667,788), viz.:

	Reproduction Cost New	Depreciation	Present Value
District Regulator Structures	$ 1,268.00	$ 175.00	$ 1,093.00
Gas Receivers and District Regulators	5,647.00	918.00	4,729.00
Distribution Line Equipment	359,498.00	49,667.00	309,831.00
Service Line Equipment	151,201.00	17,237.00	133,964.00
Meters	93,064.00	13,893.00	79,171.00
Meter Installations	15,884.00	2,353.00	13,531.00
General Office Land	13,073.00	0.00	13,073.00
Other General Land	5,178.00	0.00	5,178.00
General Office Structures	40,177.00	2,348.00	37,829.00
General Office Equipment	6,723.00	823.00	5,900.00
General Store and Shop Equipment	595.00	76.00	519.00
General Garage Equipment	2,129.00	1,202.00	927.00
General Tools and Implements	841.00	210.00	631.00
Other General Equipment	540.00	0.00	540.00
General Overheads	31,992.00	5,249.00	26,743.00
Working Capital and Material and Supplies	34,129.00	0.00	34,129.00
Total	$761,939.00	$94,151.00	$667,788.00

And the commission, coming now to consider the said complaint and appeal of The Portsmouth Gas Company of and from the said ordinance, passed by the council of the city of Portsmouth, Ohio, on February 24, 1932, fixing and prescribing the maximum prices to be charged for natural gas service for public and private consumption in the city of Portsmouth, Ohio, being fully advised in the premises, and having caused an appraisement to be made and having ascertained and hereinbefore determined and fixed the value of all of the property of said company actually used and useful for the convenience of the public in the furnishing of natural gas for public and private consumption in the said city of Portsmouth, Ohio, excluding therefrom the value of any franchise or right to own, operate or enjoy the same (exclusive of any tax or annual charge actually paid to any political subdivision of the state or county) as consideration for the grant of such franchise or right, and exclusive of any value added thereto by reason of a monopoly or merger, and having given consideration to the necessity of making reservations from income for surplus, depreciation and contingencies, and having taken into consideration all other matters which were deemed proper, further finds:

That the following adjustments by the elimination of improper system charges and the equalization of maintenance expenses are necessary to determine the actual operating expenses, exclusive of cost of purchased gas, taxes and allowance for depreciation, to determine the cost of the rendering of the service of The Portsmouth

Gas Company for the fiscal years ended February 29, 1932, and February 28, 1933, respectively.

	1932	1933
Transmission and Distribution:		
Operation	$ 30.04*	$ 121.72*
Maintenance	3,716.56*	6,071.94
Commercial Expense	14.92*	15.56*
New Business Expense	239.96*	223.69*
General Expense:		
Operation	20,546.53*	18,957.15*
	$24,548.01*	$13,246.18*

* Figure in red.

That the said city of Portsmouth, Ohio, and the appellant, The Portsmouth Gas Company have agreed that there shall be allowed the appellant herein an earning or return of 6½ percentum per annum upon the valuation herein found by the commission to be the proper rate base;

That a reasonable annual depreciation allowance to be herein made to said The Portsmouth Gas Company shall be a sum equivalent to one and one-half percentum of the value of its depreciable property;

That, adjusted by the commission as aforesaid, the actual operating expense of the appellant (exclusive of the cost of purchased gas) for the furnishing of its service in the city of Portsmouth, for the aforesaid fiscal

periods, and with the proper allowance for taxes, depreciation and return, is as follows, to wit:

Transmission and Distribution:

	1932	1933
Operation	$ 15,462.00	$ 16,237.44
Maintenance	32,400.90	25,972.45
Commercial Expense	19,184.93	19,061.56
New Business Expense	16,176.81	10,170.36
General Expense:		
Operation	26,081.90	22,991.66
Maintenance	1,372.45	1,246.02
	$110,709.03	$ 95,679.49
Taxes	20,015.39	20,015.39
Depreciation	9,231.13	9,231.13
Return	43,406.24	43,406.24
	$184,019.15	$169,918.25

That, for the same fiscal periods, the actual revenues of The Portsmouth Gas Company at the schedule of rates which it has collected under the undertaking duly given herein, were the sums of $459,560.01 and $413,035.16, respectively, from which were available, after the payment of the aforesaid operating expenses, taxes, depreciation charges and return, the respective sums of $276,198.22 and $244,702.91 for the purchase of gas, or a rate of 33 cents per 1,000 cubic feet:

That, for the same fiscal periods, the revenues of The Portsmouth Gas Company at the schedule of rates fixed and prescribed by said ordinance, would have been the sums of $305,648.00 and $275,130.80, respectively, from which, with the same deductions, would have been available for purchase of gas the respective sums of $121,628.85 and $105,918.23, or a rate of 14.36 cents per 1,000 cubic feet, and

That, therefore, the rates and charges fixed and prescribed by said ordinance are manifestly unjust, unreasonable and insufficient to yield reasonable compensation for the service of said The Portsmouth Gas Company; ought not to be ratified or confirmed and that reasonable and just rates and charges should be substituted therefor.

The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this commission.

The commission further finds that, in the absence of proof by the United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said city, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance which it has found herein to be unjust and unreasonable. It is, therefore,

Ordered, that the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the city of Portsmouth, Ohio, in conformity to the provi-

sions of the general session order of this commission adopted and promulgated under date of March 1, 1934. It is, further,

Ordered, that this matter be continued for the receipt and consideration of such presentation by the United Fuel Gas Company and the making of such further and other order or orders herein as may be necessary and proper in the premises.

The Public Utilities Commission of Ohio,
E. J. Hopple, Chairman,
Charles F. Schaber,
R. D. Williams,
Commissioners.

Dated at Columbus, Ohio, this eighteenth day of April, 1935.

A true copy: /s/ C. H. Knisley, Secretary.

APPENDIX 2.

This day, after due notice to all parties in interest, this matter came on to be heard and was heard upon the application of The United Fuel Gas Company, asking, for the reasons and upon the grounds set forth therein, a rehearing with respect to the matters and things decided and determined by the findings and order made and entered herein upon April 18, 1935, and the argument of counsel.

Whereupon, by stipulation of the parties, the city of Portsmouth, Ohio, and The United Fuel Gas Company, it is,

Ordered, that the findings made and entered herein upon April 18, 1935, be, and hereby the same are supplemented with the following additional findings of fact, to wit:

That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the state of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the state of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the state of Ohio, and the city of Ironton, in the state of Ohio, and that the distribu-

tion of natural gas in said town of New Boston and the said city of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company through a distribution system owned by said The United Fuel Gas Company; and

That the United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated.

The commission further finds that the following findings set forth and adopted in said findings as so adopted upon April 18, 1935, to wit:

> "The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this commission"

should be, and hereby the same is modified, amended and supplemented to read as follows, to wit:

> "The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this commission."

The commission, coming now to consider said application for such rehearing, and being fully advised in the premises, and having hereinbefore, upon the stipulation of said parties, adopted the aforesaid two supplemental findings of fact and amended said findings as aforesaid, finds that sufficient cause has not been made to appear in said application or the argument of counsel for a rehearing upon the said findings, as so supplemented, and the order so made and entered herein as aforesaid. It is, therefore, further,

Ordered, that the said application of said The United Fuel Gas Company, asking, for the reasons and upon the grounds set forth therein, a rehearing with respect to the matters and things decided and determined by the findings (supplemented as aforesaid) and order made and entered herein upon April 18, 1935, be, and hereby the same is denied.

To which order of the commission denying its said application for such rehearing said The United Fuel Gas Company then excepted, here now excepts and its exceptions here are noted of record.

The Public Utilities Commission of Ohio,
E. J. Hopple, Chairman,
Charles F. Schaber,
R. D. Williams,
Commissioners.

(Seal.)

Dated at Columbus, Ohio, this twenty-ninth day of May, 1935.

A true copy: C. H. Knisley, Secretary.

APPENDIX 3.

Section 3982. **Council may regulate price of electric light, gas and water.** The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them.

Section 614-44. **Power of municipalities to fix rate, price, change, etc.; written complaint; hearing.**

Any municipal corporation in which any public utility is established may, by ordinance, at any time within one year before the expiration of any contract entered into

under the provisions of Sections 3644, 3982 and 3983 of the General Code between the municipality and such public utility with request to the rate, price, charge, toll, or rental to be made, charged, demanded, collected, or exacted, for any commodity, utility or service by such public utility, or at any time authorized by law proceed to fix the price, rate, charge, toll or rental that such public utility may charge, demand, exact or collect therefor for an ensuing period, as provided in Sections 3644, 3982 and 3983 of the General Code. Thereupon, the commission, upon complaint in writing, of such public utilities, or upon complaint of one percentum of the electors of such municipal corporation, which complaints shall be filed within sixty days after the passage of such ordinance, shall give thirty days' notice of the filing and pendency of such complaint to the public utility and the mayor of such municipality, of the time and place of the hearing thereof, and which shall plainly state the matters and things complained of.

* * * * * * * * * * *

Hearing upon accepted rates; procedure.

If any public utility shall have accepted any rate, price, charge, toll, or rental fixed by ordinance of such municipality, the same shall become operative, unless within sixty days after such acceptance there shall have been filed with the commission, a complaint signed by not less than three percentum of the qualified electors of such municipality. Upon such filing, the commission shall forthwith give notice of the filing and pendency of such complaint to the mayor of such municipality and fix a time and place for the hearing thereof. The commission shall, at such time and place, proceed to hear

such complaint, and may adjourn the hearing thereof from day to day.

Filing complaint held to be consent to continue to furnish produce or service.

The filing of a complaint by a public utility, as herein provided, shall be taken and held to be the consent of such public utility to continue to furnish its product or service, and devote its property engaged therein to such public use during the term so fixed by ordinance or by the provisions of this act. Parties thereto shall be entitled to be heard, represented by counsel, and to have process to force the attendance of witnesses.

Section 614-45. **Ordinance rate not to be suspended without bond.**

No such complaint or appeal to the commission shall suspend, vacate, or set aside the rate, price, charge, toll or rental fixed by ordinance unless such public utility shall elect to charge the rate, price, charge, toll or rental in force and effect immediately prior to the taking effect of the regulation complained of and appealed from and shall give an undertaking in such amount as the commission shall determine. The undertaking shall be filed with the commission and shall be payable to the state of Ohio for the use and benefit of the consumers affected by the regulation in question. The condition of the undertaking shall be that such public utility shall refund to each of its consumers, public or private, the amount collected by it in excess of the amount which shall finally be determined it was authorized to collect from such consumers. The commission shall make all necessary orders in respect to the form of such undertaking and the manner of making such refunders. Such complaint or appeal to the commission shall suspend,

vacate and set aside all the provisions of the ordinance complained of and appealed from excepting the rate, price, charge, toll or rental fixed thereby.

Section 614-46. **Findings as to rate; valuation of property, etc.**

If the commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental, so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility, actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as a consideration or the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger and to the necessity of making reservations from the income for surplus, depreciation and contingencies, and such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance which shall not be less than two years, and order the same substituted for the rate, price, charge, toll or rental so fixed by ordinance or the commission may find and declare that the rate, price, charge, toll or rental, so fixed by ordinance, is just and reasonable, and ratify and confirm the same.

When effective.

No such rate, price, charge, toll or rental so determined by the commission shall become effective or valid until after the commission shall have ascertained and determined the valuation upon which such price, charge, toll or rental is based as provided in this act. And such valuation so determined shall be, at all times, open to public inspection. Thereupon the commission shall make inquiry and investigation with respect to the ability of such public utility to furnish its product such period, if it be found that it is able so to do, the commission shall order the public utility in question to continue to furnish the same for the period and at the rate, price, charge, toll or rental so fixed and determined, and such public utility shall continue to furnish its product as provided in such order. If the commission, after the hearing provided for in Sections 614-44 and 614-46 of the General Code shall be of the opinion that any provisions of the ordinance appealed from or complained of other than the rate, price, charge, toll or rental fixed thereby are or will be unjust or unreasonable or that the form and structure of the rate, price, charge, toll or rental fixed thereby may be unfair or unreasonable, or may have the effect of causing any rate, price, charge, toll or rental to be fixed by the commission to become unfair or unreasonable, the commission shall in its order strike out such unjust or unreasonable provisions, conditions, form and structure of said ordinance and shall substitute therefor, if it deem it necessary such provisions and conditions as it may consider fair and reasonable, and make such changes in the form and structure of the rate, price, charge, toll or rental fixed in such ordinance as it may consider fair and reasonable.

Section 487. **The Public Utilities Commission of Ohio; appointment, term, vacancies.** There shall be and there is hereby created a Public Utilities Commission of Ohio and by that name the commission may sue and be sued. The Public Utilities Commission shall consist of three members, who shall be appointed by the governor with the advice and consent of the senate, and shall possess the powers and duties herein specified as well as all powers necessary and proper to carry out the purposes of this chapter. Immediately after this act shall take effect, the governor shall, with the advice and consent of the senate, appoint a member whose term shall expire on the first day of February, 1915; another whose term shall expire on the first day of February, 1917, and another whose term shall expire on the first day of February, 1919; and thereafter each member shall be appointed and confirmed for a term of six years. Vacancies shall be filled in the same manner for unexpired terms. One of such commissioners, to be designated by the governor, shall, during the term of the appointing governor, be the chairman of the commission. Not more than two of said commissioners shall belong to or be affiliated with the same political party.

Section 614-2. **Definitions.** The following words and phrases used in this chapter unless the same is inconsistent with the text, shall be construed as follows:

The term "commission" when used in this act, or in chapter one, division two, title three, part first of the General Code (Section 487 et seq.) and the acts amendatory or supplementary thereto means "the public utilities commission of Ohio."

The term "commissioner" means one of the members of such commission.

Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

* * * * * * * * * * * *

When engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within this state, is a natural gas company, or when engaged in the business of supplying natural gas to gas companies or to natural gas companies within this state, is a natural gas company; provided that a producer supplying to one or more gas or natural gas companies, only such gas as shall be produced by such producer from wells drilled on land owned in fee by such producer or where the principal use of such land by said producer is other than the production of gas, within this state, shall not thereby become a natural gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas company providing for the supply of natural gas and for compensation for the same, shall be subject to the jurisdiction of the commission whether or not such rates, rentals, tolls, schedules, charges or agreements shall have been agreed upon or put into effect prior to the taking effect of this provision; provided, however, that authority be and hereby is granted to The Public Utilities Commission of Ohio, upon application made to it, to relieve any producer of natural gas, hereinbefore defined as a gas company or a natural gas company, of compliance with the obligations imposed by this chapter, so long as such producer be not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural

gas, or so long as such producer does not engage in the distribution of natural gas to consumers;

When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partly within this state, is a pipe line company;

* * * * * * * * * * * *

Section 614-2a. **Defining "public utility."**

The term "public utility" as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as "railroads" in General Code Sections 501 and 502, and these terms shall apply in defining "public utilities" and "railroads" wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplemental thereto or in this act.

Section 614-3. **Powers and jurisdiction to supervise and regulate public utilities and railroads.**

The Public Utilities Commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate "public utilities" and "railroads" as herein defined and provided and to require all public utilities to furnish their products and render all services exacted by the commission, or by law, and also to promulgate and enforce all orders relating to the protection, welfare and safety of railroad employees and the traveling public.

Section 614-4. **Scope of jurisdiction.** The jurisdiction, supervision, powers and duties of the public service commission shall extend to every public utility and rail-

road, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state, and to the persons or companies owning, leasing or operating the same, and to the records and accounts of the business thereof done within this state.

Section 614-6. **Examination of witnesses and production of records.** The commission shall have power, either through its members or by inspectors or employes duly authorized by it, to examine under oath, at any time and for assisting the commission in the performance of any powers or duties of the commission, any officer, agent or employe of any public utility or railroad or any other person, in relation to the business and affairs of such utility and to compel the attendance of such witness for the purpose of such examination. In case of disobedience on the part of any person or persons to comply with any order relating to the production or examination of books, contracts, records, documents and papers or in case of the refusal of any person to testify to any matter regarding which he may be lawfully interrogated by any such member, employe or inspector of the commission at any time or place, it shall be the duty of the Common Pleas Court of any county or any judge thereof, on application of any member of the commission, to compel obedience by contempt proceedings as in the case of the disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein.

Section 614-7. **Examination of records.** The commission shall have power, either through its members or by inspectors or employes duly authorized by it, to examine all books, contracts, records, documents and papers of

any public utility, and by subpoena duces tecum to compel the production thereof, or of duly verified copies of the same or any of them, and to compel the attendance of such witnesses as the commission may require to give evidence at such examination.

Section 614-8. **General supervision.** The commission shall have general supervision over all public utilities within its jurisdiction as hereinbefore defined, and shall have the power to examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and also with respect to the safety and security of the public and their employes, and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirements. The commission, either through its members or inspectors or employes, duly authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device and lines of any public utility.

Section 614-9. **May require copy of contract.** Every public utility shall file with the commission, when and as required by it, a copy of any contract, agreement or arrangement, in writing, with any other public utility relating in any way to the construction, maintenance or use of its plant or property, or any service, rate or charge.

Section 614-12. **Unreasonable charge prohibited.** Every public utility shall furnish necessary and adequate service and facilities which shall be reasonable and just,

and every unjust or unreasonable charge for such service is prohibited and declared to be unlawful.

Section 614-15. **Undue advantage.** No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 543. **Rehearing; who may have.** After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unreasonable or unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for a rehearing made within less than ten days before the effective date of the order

as to which a rehearing is sought, and not granted within twenty days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application.

Time of hearing, when granted without suspension of order. If an application for a rehearing be granted without suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the same within twenty days after final submission and if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change or modify the same. An order or decision made after such rehearing, abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

Section 544. **Order may be reversed.** A final order made by the commission shall be reversed, vacated or modified by the Supreme Court on appeal, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable.

Section 545. **Notice of appeal seeking reversal, vacation or modification.** The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the commission by any party to the proceeding before the commission, against The Public Utilities Commission of Ohio, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless the same is duly waived, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-appeal.

Section 548. **Stay of execution.** No proceeding to reverse, vacate or modify a final order rendered by the commission shall operate to stay execution thereof unless the Supreme Court or a judge thereof in vacation, on application and three days' notice to the commission, shall allow such stay, in which event the appellant shall be required to execute an undertaking, payable to the state of Ohio, in such a sum as the court may prescribe, with surety to the satisfaction of the clerk of the Supreme Court, conditioned for the prompt payment by the appellant of all damages arising from or caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm or corporation for transportation, transmission, produce, commodity or service in excess of the charges

fixed by the order complained of, in the event such order be sustained.

Section 538. **Commission may rescind or amend an order.** Upon application of any person or any railroad and after notice to the parties in interest and opportunity to be heard as provided in this chapter for other hearings, has been given, the commission may rescind, alter or amend an order fixing any rate or rates, fares, charges or classification, or any other order made by the commission. Certified copies of such order shall be served and take effect as provided for original orders.

APPENDIX 4.

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 1141 In Equity. (Columbus)—United Fuel Gas Company, Plaintiff, vs. The Public Utilities Commission, et al., Defendants.

Decision.

(October 2, 1941.)

Before Allen, Circuit Judge, and Nevin and Underwood, District Judges.

Per Curiam:

Plaintiff, a West Virginia corporation, is a producer and purchaser of natural gas in that state. Defendants are The Public Utilities Commission of Ohio (hereinafter called the commission); certain named state officials acting for it and on its behalf; the city of Portsmouth, Ohio, and Portsmouth Gas Company, an Ohio corporation. Due to their tenure of office and for various reasons changes have occurred from time to time in respect to individual defendants but proper substitutions have been made.

In 1931 plaintiff entered into a contract with defendant, Portsmouth Gas Company, for sale to that company of a supply of natural gas which Portsmouth Gas Company in turn sold and distributed to its customers in Portsmouth, Ohio. Portsmouth Gas Company is not a producer of natural gas and has no available gas of its own. That contract ran for five years. It expired on November 1, 1936. Prior to its expiration, the date thereof was extended, however, to November 1, 1937 (amended complaint and stipulation of parties both filed

November 20, 1936), and thereafter to November 1, 1941 (second amended complaint filed March 8, 1939, and third amended complaint filed April 8, 1941).

After the two gas companies had entered into their contract, the city of Portsmouth passed an ordinance fixing certain rates for the distribution of natural gas in that city. Not content with those rates, the Portsmouth Gas Company appealed to The Public Utilities Commission of Ohio. For its determination of the question presented, the commission found that it was necessary to bring plaintiff herein into the proceedings before it, and it was so ordered.

Plaintiff appeared before the commission and moved to be dismissed but its motion was denied.

After a hearing, the commission found on April 18, 1935, that the rates fixed by the city ordinance of the city of Portsmouth "are manifestly unjust, unreasonable and insufficient to yield reasonable compensation" to the Portsmouth Gas Company, and it further found and ordered on said date, as follows:

> "The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this commission.
>
> "The commission further finds that, in the absence of proof by The United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said city, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance

which it has found herein to be unjust and unreasonable. It is, therefore,

"Ordered, that the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the city of Portsmouth, Ohio, in conformity to the provisions of the general session order of this commission adopted and promulgated under date of March 1, 1934. * * *"

On May 14, 1935, plaintiff herein filed a "petition for rehearing" before the commission on the order, in so far as it was affected thereby, entered on April 18, 1935.

Subsequently, to wit: on May 29, 1935, the commission denied this application for a rehearing and its order of April 18, 1935, was left in full force and effect. However, along with its denial of the application and in the same order, the commission ordered as follows:

"That the findings made and entered herein upon April 18, 1935, be, and hereby the same are supplemented with the following additional findings of fact, to wit: That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the states of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the state of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distri-

bution system supplying the town of New Boston, in the state of Ohio, and the city of Ironton, in the state of Ohio, and that the distribution of natural gas in said town of New Boston and the said city of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company; and

"That The United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated.

"The commission further finds that the following findings set forth and adopted in said findings as so adopted upon April 18, 1935, to wit:

" 'The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefore are subject to the jurisdiction of this commission' should be, and hereby the same is modified, amended and supplemented to read as follows, to wit:

" 'The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefore are subject to the jurisdiction of this commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this commission.'

"Thereafter, on July 3, 1935, plaintiff filed its bill of complaint herein praying, for the reasons alleged

in the bill, inter alia, 'That the orders of said The Public Utilities Commission of Ohio of April 18, 1935, and May 29, 1935, requiring this plaintiff to prove the cost of producing and delivering the natural gas furnished by it to the defendant Portsmouth Gas Company be declared null and void and of no effect,' and that the commission and certain of the defendants, acting for it and on its behalf 'be enjoined, inhibited and restrained from regulating or attempting to regulate the transactions between this plaintiff and the said defendant Portsmouth Gas Company under the contract referred to herein, and that, pending the determination of its right to such permanent injunction, an interlocutory injunction be granted in accordance with the foregoing."

Plaintiff prayed also for a temporary restraining order and, on July 3, 1935, a temporary restraining order as prayed for was signed and issued by the late Hon. Benson W. Hough,[1] then United States District Judge for the Southern District of Ohio.

In its bill of complaint, plaintiff sets out several reasons upon any or all of which it claims it is entitled to the relief prayed for.

At the outset and primarily, however, it challenges the jurisdiction of the commission, claiming that the commission "is without any jurisdiction to make such orders or requirements of this plaintiff"; and "that the statute under which it is acting, giving it such power as construed by it, violates the commerce clause of the Constitution of the United States • • •."

In their answer, filed July 30, 1935, the commission and the other defendants named herein as acting for

[1] Subsequently, the cause came on for hearing and argument before a statutory three-judge court, of which Judge Hough was a member. Judge Hough died, however, before the case was decided necessitating a reargument at a later date before the three-judge court, as now constituted.

and in its behalf assert that the commission does have jurisdiction; that the statute referred to is constitutional, and that the orders and directions of the commission are in all respects proper and according to law.

On September 23, 1935, a stipulation, signed by counsel for the respective parties thereto, was filed, reading as follows:

> "It is stipulated by the parties hereto that the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, a copy of which is filed as Exhibit G with the bill, are the facts in regard to the natural gas and its movement pertinent to the consideration of the question involved in this case and the said findings of fact by the said The Public Utilities Commission may be treated by the court as admissions of the parties in regard thereto * * *."

On November 20, 1936, plaintiff filed an amended bill of complaint and on March 8, 1939, its second amended and supplemental bill of complaint, praying in each instance as in its original bill.

On March 10, 1939, a stipulation, signed by all the parties, was filed herein, reading as follows:

> "It is hereby stipulated by the parties to this proceeding that the facts stated in the second amended bill of complaint herein are true and may be considered by the court as having been proven herein. This does not apply to conclusions of law."

On April 8, 1941, plaintiff filed a third amended and supplemental bill of complaint reiterating therein the prayer of its original and amended bills.

On April 24, 1941, defendants, Public Utilities Commission of Ohio, George C. McConnaughey, chairman of said commission, Dennis F. Dunlavy and Harry M.

Miller, members, Thomas J. Herbert, attorney general of the state of Ohio, and Kenneth L. Sater, special counsel for said commission, filed a motion to dismiss the third amended bill of complaint for the reasons and on the grounds set forth in the motion. This motion was overruled on July 8, 1941.

On July 28, 1941, defendants filed an application for leave to file their answer to plaintiffs' third amended and supplemental complaint. On August 4, 1941, leave was granted defendants so to do, and on the same day, to wit, August 4, 1941, defendants filed their answer.

The cause is now before the court on plaintiff's third amended and supplemental bill of complaint; defendants' answer thereto (just referred to) and the record, including the stipulation (above) of the parties as to the facts, which as alleged in the third amended bill are in substance the same as stated in the second amended bill (and in the original bill and amended bill as well, except for a reference to the "National Gas Act" in the second amended bill), except that it is recited in the third amended complaint that the contract between plaintiff and defendant, Portsmouth Gas Company, referred to in the second amended complaint has been continued by the parties thereto "upon the same terms and conditions as provided by said last extension."

In their brief (pp. 5-6), counsel for the commission and those defendants acting for it and on its behalf say, "It may be conceded upon the basis of the record taken before the commission that the transportation into the state of Ohio by pipe lines of gas produced by the plaintiff in West Virginia and Kentucky is interstate commerce. It may be further conceded that the primary power to regulate the transportation of gas in interstate

commerce rests with the Congress of the United States and that the Congress of the United States has not yet seen fit to exercise that power. It may be admitted further that if the mere fact that the transportation of such gas in interstate commerce precludes the state from exercising any jurisdiction thereover despite the fact that Congress has not seen fit to exercise its powers, and despite the fact that the exercise of such jurisdiction may be necessary in the interests of local regulation and despite any other facts which may be presented in a particular case, then The Public Utilities Commission of Ohio has no jurisdiction over the United Fuel Gas Company in the case that is here presented.

"On the other hand, if the interstate transportation of gas does not of itself preclude state regulation in a proper case where the nature of the regulation is primarily local in character, and where it is essential to the exercise of the regulatory functions of a public service commission, and where the particular facts of the case warrant the exercise of the power conferred by the legislative enactment in the state in question, and where Congress has failed to exercise its paramount authority, then the orders of The Public Utilities Commission of Ohio which are here sought to be enjoined may be sustained."

The sale and delivery of natural gas to the Portsmouth Gas Company is thus clearly interstate commerce, and compilation of voluminous data has been demanded for use in a proceeding by the state commission to determine the fair and reasonable rate to be collected by the local distributing company with which the plaintiff has contracted to sell its product and services for a definite period at a definite price. The two contracting parties

are entirely separate and distinct from each other and are so operated. In view of such relationship and the nature of the inquiry before the Ohio commission it is believed that the jurisdiction sought to be asserted falls outside the orbit of state regulation now permissible.

Since this suit was instituted, the Congress of the United States, to wit, on June 21, 1938, passed an act known as the "Natural Gas Act" entitled, "An Act to regulate the transportation and sale of natural gas in interstate commerce, and for other purposes." Title 15, Section 717, U. S. C. A., c. 556, Section 1, 52 Stat., 821. Among others, the Natural Gas Act contains the following provisions:

> "Section 1 (b). The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."
>
> "Section 4 (a). All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the commission * * * shall be just and reasonable * * *."
>
> "Section 5 (a). Whenever the commission * * * shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company * * * subject to the jurisdiction of the commission * * * is unjust, unreasonable, unduly discriminatory, or preferential, the commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order * * *."

"Section 5 (b). The commission upon its own motion, or upon the request of any state commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the commission has no authority to establish a rate governing the transportation or sale of such natural gas."

"Section 6 (a). The commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

"(b). Every natural-gas company upon request shall file with the commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the commission informed regarding the cost of all additions, betterments, extensions, and new construction."

Natural Gas Pipe Line Co. v. Slattery, 302 U. S., 300, held a state statute which demands access to books and accounts of a pipe line company selling natural gas in interstate commerce and requires production of the information sought, to be not unconstitutional. That case involved a transaction between public utilities which were affiliates. Here the plaintiff and the defendant the Portsmouth Gas Company are conceded by the defendant commission to have no connection with each other by way of interlocking directorates, unity of interest, or affiliation. They are entirely separate and distinct from each other and are so operated. Their dealings were and are at "arm's length." Cf. Natural Gas Pipe Line Co. v. Slattery, supra, at 306. This is an important distinction and completely differentiates the operation

herein involved, from that held to be subject to examination in the Slattery case. However, it is not the sole differentiating feature between the two cases, for the Slattery case was decided prior to the enactment of the "Natural Gas Act," supra, the provisions of which, in our opinion, compel the issuance of the injunction prayed for.

Regardless of the right or jurisdiction of the Ohio commission to issue the orders herein complained of on April 18, 1935, and May 29, 1935, it was deprived of any further jurisdiction by the passage of the Natural Gas Act on June 21, 1938. The transactions involved are squarely covered by the Natural Gas Act, constituting as they do "the sale in interstate commerce of natural gas for resale for ultimate public consumption" (Section 1(b)). Under this statute The Public Utilities Commission of Ohio might have filed a complaint charging that the rates made by the United Fuel Gas Company in the sale of its gas to the Portsmouth Gas Company are unjust, unreasonable, or unduly discriminatory or preferential, and the federal commission thereupon would have been empowered to determine the just and reasonable contract rate to be thereafter observed and enforced. Section 5 (a). The Federal Power Commission is required to "make available" to the Ohio commission such information and reports as may be of assistance in state regulation, and may upon request from the Ohio commission make available as witnesses any of its own trained experts. Section 17 (c). We think that these provisions are significant.

Prior to the enactment of the Natural Gas Act it was permissible for the state to regulate local features of interstate commerce in gas. Pennsylvania Gas Co. v.

Public Service Commission, 252 U. S., 23, 29; East Ohio Gas Co. v. Tax Commission of Ohio, 283 U. S., 465. Since the federal statute has been enacted, giving to the Federal Power Commission the power to fix the contract rate between plaintiff and the Portsmouth Gas Company, the Congress has occupied the field and the power is exclusive in the Federal Power Commission. The right to conduct investigations as to contracts for sale of gas in interstate commerce, which is an incident to the rate-making power, is also exclusively confided to the Federal Power Commission. We conclude that since the passage of the Natural Gas Act the Ohio commission and these defendants acting for it and on its behalf have been and are without legal right or authority to enforce the orders of the commission entered April 18, 1935, and May 29, 1935.

Upon the record here the court finds, therefore, that an interlocutory injunction should be granted enjoining defendant, The Public Utilities Commission of Ohio and each and all other defendants herein acting for it or on its behalf from enforcing or seeking to enforce, or execute, the orders of the commission entered by it on April 18, 1935, and May 29, 1935, against plaintiff herein.

The court adopts as its findings of fact herein, the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, to the extent and as set forth and referred to by the parties to the stipulation filed herein on September 23, 1935.

Each party to pay its own costs.

Counsel may prepare and submit an order accordingly.

APPENDIX 5.

This cause came on to be heard upon the original bill and exhibits therewith filed, and upon the several amended and supplemental bills, the answer of the several defendants, the agreed statement of facts, and all orders heretofore made and entered herein; and the parties having offered nothing further in support of their respective contentions the case is submitted for final decision; from all of which matters so submitted, the court is of the opinion, for reasons stated in writing and filed with the record herein, that the plaintiff is entitled to the relief prayed for in its original and amended and supplemental bills.

It is therefore adjudged, ordered and decreed that the defendant, Public Utilities Commission of Ohio, and each and all other defendants herein acting for it or on its behalf be and they hereby are enjoined from enforcing or seeking to enforce against the plaintiff the orders of said The Public Utilities Commission of Ohio entered by it April 18, 1935, and May 29, 1935, which orders are exhibited with the plaintiffs' bill filed herein.

Each party shall pay its own costs.

To all of which defendants jointly and severally except, and their exceptions are hereby noted of record.